TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 417

LEWYT CORPORATION (NOW KNOWN AS LEWYT MANUFACTURING CORPORATION), PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 20, 1954

CERTIORARI GRANTED DECEMBER 6, 1954

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BEFORE THE TAX COURT OF THE UNITED STATES

EXHIBIT A, ANNEXED TO PETITION—Filed May 8, 1950

Treasury Department
Internal Revenue Service

Office of
Internal Revenue Agent in Chicago
Brooklyn Division
One Hanson Place
Brooklyn 17, New York

February 16, 1950

Lewyt Corporation
60 Broadway
Brooklyn 11, New York

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended September 30, 1944, discloses a deficiency of $7,129.21, and that the determination of your excess profits tax liability for such year discloses an overassessment of $6,443.59, and that the determination of your income tax liability for the taxable year ended September 30, 1945, discloses an overassessment of $4,151.49, and that the determination of your excess profits tax liability for such year discloses a deficiency of $428,288.05, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Brooklyn, New York for the attention of SAD:90D. The signing and filing of this form

will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest [fol. 14] period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours, Geo. J. Schoeneman, Commissioner, By (Signed) E. X. Kelly, Acting Internal Revenue Agent in Charge.

Enclosures:
Statement
Form of Waiver, Forms 843
MRW: MEV

Statement

LEWT CORPORATION
60 Broadway
Brooklyn 11, New York

Tax Liability for the Taxable Years Ended September 30, 1944 and September 30, 1945

Year	Liability	Assessed	Over-assessment	Deficiency
		Income Tax		
9/30/44	$ 35,712.34	$ 28,583.13	.....	$ 7,129.21
9/30/45	20,318.49	24,469.98	$4,151.49	.....
		Excess Profits Tax		
9/30/44	$280,540.33	$286,983.92	$6,443.59	.....
9/30/45	192,810.61	(235,477.44)	.....	$428,288.05

In making this determination of your income tax and excess profits tax liabilities, careful consideration has been given to the report of examination dated July 26, 1948; to your protest dated October 22, 1948; and to the statements made at the conferences held on November 18, 1948 and May 17 and September 19, 1949.

[fol. 15] It is held that since your records are maintained, and your Federal income and excess profits tax returns are filed, on the accrual basis, taxes referred to in section 122(d)(6) of the Internal Revenue Code may be allowed as a deduction only to the extent that they accrued within the taxable year in determining your net operating loss deductions. Therefore, your contention that $625,640.60 and $298,538.61 should be allowed as deductions in determining

the net operating loss for the years 1946 and 1947, respectively, has been denied.

It is held also that Federal income and excess profits taxes accrue on the last day of the year for which assessed and therefore must be eliminated from the surplus account as of the beginning of the following year for the purpose of determining your equity invested capital. Therefore your contention that your surplus as of the beginning of the taxable years in question should not be reduced by additional income and excess profits taxes in controversy until such controversy has been terminated has been denied.

It is further held that excess profits disclosed by the renegotiation of war contracts never represented income for the years for which determined and consequently should not have been included in surplus. Your contention, therefore, that excess profits resulting from the renegotiation of war contracts should not be excluded from invested capital until finally determined, has also been denied.

The overassessments shown herein will be made the subject of certificates of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessments referred to in this letter, by filing with the collector of internal revenue for your district, claims for refund on Form 843, copies of which are enclosed, the basis of which may be as set forth herein.

[fol. 16] A copy of this letter and statement has been mailed to your representative, Mr. Victor I. Seidman, 285 Madison Avenue, New York, N. Y., in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended September 30, 1944
Adjustments to Net Income

Net income as disclosed by amended return		$ 747,236.60
Unallowable deductions and additional income:		
(a) Capital expenditures	$ 8,637.07	
(b) Entertaining expenses	3,943.46	
(c) Bad Debts	13,280.35	
(d) Officer's salary	13,000.00	
(e) Net operating loss carry-over	70,444.30	
(f) New York State franchise tax	24,416.76	
(g) Cost of goods sold	145,118.14	278,840.08
Total		$1,026,076.68
Nontaxable income and additional deductions:		
(h) Depreciation	$ 355.09	
(i) Amortization of emergency facilities	21,770.00	
(j) Capital stock tax	12,500.00	
(k) Termination claim	8,614.78	
(l) Renegotiation of war contracts	397,970.00	
(m) Net operating loss carry-back	164,326.38	605,536.25
Net income for declared value excess profits tax computation, adjusted		$ 420,540.43

[fol. 17] Explanation of Adjustments

(a) Repairs claimed per return	$33,056.61
Allowed	24,419.54
Disallowed	$ 8,637.07

To the extent disallowed the amount represents capital expenditures that are not deductible under the provisions of Section 24(a) of the Internal Revenue Code.

(b) Entertaining expense of $3,943.46 claimed among the deductions that are on the return are disallowed for lack of substantiation and failure to meet the other requirements of Section 23(a) of the Internal Revenue Code.

(c) Bad debts claimed per return	$26,560.69
Allowed	13,280.34
Disallowed	$13,280.35

To the extent disallowed the amount represents an excessive addition to the reserve for bad debts which is not allowable under the provisions of Section 23(k) of the Internal Revenue Code.

(d) It is held that a reasonable allowance for compensation for personal services actually rendered by Mrs. Madge Ferredy does not exceed $12,000.00 for the taxable year. The amount of $25,000.00 deducted in your return is accordingly disallowed to the extent of $13,000.00

(e) Net operating loss carry-over of $70,444.30 claimed from the taxable year December 31, 1942 to September 30, 1943 is disallowed since it has been determined that you realized a net profit in such year in lieu of the loss claimed.

(f) An excessive deduction of $24,416.76 for New York State franchise tax is disallowed, $136,098.91 having been deducted in the return, whereas liability was incurred during the taxable year in the amount of $111,682.15.

[fol. 18](g) The value of unfilled war contracts and orders, acquired from Alexander M. Lewyt and Madge Ferredy on December 31, 1942, has been determined to amount to $84,328.25 of which $51,954.63 was allowed as a part of the cost of goods sold for the taxable year December 31, 1942 to September 30, 1943 which was agreed to by you. Accordingly, the balance of $32,373.62 is allowed as a part of the cost of goods sold in this year in lieu of the $177,491.76 claimed in your return.

(h) An additional depreciation deduction of $355.09 has been allowed.

(i) An additional deduction of $21,770.00 has been allowed for amortization of emergency facilities.

(j) An additional deduction of $12,500.00 has been allowed for Federal capital stock tax.

(k) Payment of $8,614.78 made by you on termination claim in the year ended September 30, 1946 has been determined to be deductible in this year.

(l) To reduce net income per return by the amount of excessive profits arising from renegotiation of war contracts.

(m) A net operating loss carry-back of $164,326.38 has been allowed from the year ended September 30, 1946 as shown below under Adjustments to Net Income.

Income Tax Computation

	Applicable to Calendar Year 1943	1944
Net income for declared value excess profits tax computation, adjusted	$420,540.43	$420,540.43
Less: Declared value excess profits tax	none	none
Net income	$420,540.43	$420,540.43
Less. Income subject to excess profits tax as shown below	335,002.76	330,002.76
[fol. 19] Normal tax net income and surtax net income	$ 85,537.67	$ 90,537.67
Normal tax at 24%	$ 20,529.04	$ 21,729.04
Surtax at 16%	13,686.03	14,486.03
Total normal tax and surtax	$ 34,215.07	$ 36,215.07
Tentative tax 1943—$34,215.07 x 92/366		$ 8,600.51
Tentative tax 1944—$36,215.07 x 274/366		$ 27.111.83
Income tax liability		$ 35,712.34
Assessed: Original, Acc't 416533, Feb. 1945 (3rd N. Y.)		28,583.13
Deficiency of income tax		$ 7,129.21

Adjustments to Excess Profits Net Income Computed Under Invested Capital Credit Method

Excess profits net income as disclosed by amended return	$757,408.69
Addition:	
(a) 50% of interest on borrowed capital for year ended September 30, 1946	8,076.26
Total	$765,484.95

Deduction:	
(b) Net decrease in net income as shown under adjustments to net income above	326,696.17
Excess profits net income adjusted	$438,788.78

Adjustment to Excess Profits Credit
Based on Invested Capital

Invested capital as disclosed by amended return	$957,873.90
Deduction:	
(a) Accumulated earnings and profits	306,834.76
Invested capital as adjusted	$651,039.14

[fol. 20] Explanation of Adjustment

(a) Accumulated earnings and profits at beginning of taxable year per return	$306,834.76
As corrected	none
Adjustment shown above	$306,834.76

Computation of Excess Profits Credit Based on Invested Capital

Invested capital as adjusted	$651,039.14
Excess profits credit (8% of $651,039.14)	52,083.13

Excess Profits Tax Computation

	Applicable to Calendar Year 1943		1944	
Excess profits net income based on invested capital as shown above		$438,788.78		$438,788.78
Less: Specific exemption	$ 5,000.00		$ 10,000.00	
Excess profits credit based on invested capital as shown above	52,083.13		52,083.13	
Unused excess profits credit from year ended Sept. 30, 1946 as shown below	46,702.89	103,786.02	46,702.89	108,786.02
Adjusted excess profits net income		$335,002.76		$330,002.76
1943—90% of $35,002.76		$301,502.48		
1944—95% of $330,002.76				$313,502.62
Surtax net income (before Sec. 26 (e) credit)	$420,540.43		$420,540.43	
80% of $420,540.43	$336,432.34		$336,432.34	
Less normal tax and surtax as shown above	34,215.07		36,215.07	
Difference		$302,217.27		$300,217.27
Applicable excess profits tax		$301,502.48		$300,217.27
Tentative tax 1943 ($301,502.48 x 92/366)				$ 75,787.47
Tentative tax 1944 ($300,217.27 x 274/366)				224,752.86
Excess profits tax				$300,540.33
Less: Credit for debt retirement				20,000.00
Excess profits tax liability				$280,540.33
Assessed: Original, Acc't. # 407342, Feb. 1945 (3rd NY)			$605,561.59	
Less: Credit allowed under Sec. 3806 (b)			318,577.67	286,983.92
Overassessment of excess profits tax				$ 6,443.59

[fol. 21] Post-War Refund of Excess Profits Tax and Credit for Debt Retirement

Excess profits tax before credit for debt retirement		$ 300,540.33
Credit allowable under sections 780 and 781 (10% of $300,540.33)		$ 30,054.03
Reduction in indebtedness	$ 50,000.00	
Credit for debt retirement (40% of $50,000.00		20,000.00
Net post-war refund credit		$ 10,054.03

Taxable Year Ended September 30, 1945
Adjustments to Net Income

Net income as disclosed by return		$1,215,320.25
Unallowable deductions and additional income:		
(a) Capital expenditures	$ 17,157.59	
(b) Entertaining expenses	2,773.37	
(c) Bad debts	12,287.34	
(d) Termination claims	108,453.87	
(e) Officer's salary	13,000.00	
(f) New York State franchise tax refund	53,607.79	
(g) Contributions	20,005.42	227,285.38
Total		$1,442,605.63

Nontaxable income and additional deductions:		
(h) Depreciation	$ 3,067.15	
(i) Renegotiation of War contracts	327,052.00	
(j) Net operating loss carry-back	786,383.25	
(k) New York State franchise tax	43,233.98	1,159,736.38
Net income for declared value excess profits tax computation, adjusted		$ 282,869.25

[fol. 22] Explanation of Adjustments

(a) The amount of $17,157.59 representing capital expenditures, included among the deductions on the return, is disallowed in accordance with the provisions of section 24 (a) of the Internal Revenue Code.

(b) Entertaining expenses of $2,773.37 included among the deductions on the return are disallowed for lack of substantiation and failure to meet the other requirements of section 23 (a) of the Internal Revenue Code.

(c) Bad debts claimed per return		$ 24,574.68
Allowed		12,287.34
Disallowed		$ 12,287.34

To the extent disallowed the amount represents an excessive addition to the reserve for bad debts which is not allowable under the provisions of section 23 (k) of the Internal Revenue Code.

(d) The amount of $108,453.87, representing reimbursements received by you in the year ended September 30, 1946 by reason of the termination of government contracts, is held to constitute taxable income in this year, the year in which the value of your claims was determined, under the provisions of section 42 of the Internal Revenue Code since your returns are rendered on the accrual basis.

(e) It is held that a reasonable allowance for compensation for personal services actually rendered by Mrs. Madge Ferredy does not exceed $12,000.00 for the taxable year. The amount of $25,000.00 deducted on your return is accordingly disallowed to the extent of $13,000.00.

[fol. 23] (f) It is held that a refund of New York State frachise tax to you constitutes taxable income in this year in the amount of $53,607.79, determined as follows:

Net income for year 1942 before renegotiation adjustment	$1,861,369.24	
6% of above		5 111,682.15
Net income after renegotiation adjustment	$ 822,369.24	
6% of above		49,342.15
Difference		$ 62,340.00
Amount of New York State franchise tax allowed as a credit by Renegotiation Board	$ 58,074.36	
Less: New York State franchise tax after renegotiation adjustment	49,342.15	8,732.21
Adjustment shown above		$ 53,607.79

(g) An excessive deduction for contributions of $20,005.42 is disallowed, determined as follows:

Net income per return		$1,225,641.63
Add: Contributions deducted per return	$ 35,436.50	
Adjustments (a) to (f), inclusive above	207,279.96	242,716.46
		$1,468,358.09
Less: Adjustments (h) to (k), inclusive, below		1,159,736.38
Revised net income before deduction for contributions		$ 308,621.71
Contributions allowable (5% of $308,621.71)		$ 15,431.08
Contributions deducted per return		35,436.50
Adjustment shown above		$ 20,005.42

[fol. 24] (h) An additional depreciation deduction of $3,067.15 has been allowed.

(i) To reduce net income per return by the amount of excessive profits arising from renegotiation of war contracts.

(j) A net operating loss carry-back of $786,383.25 has been allowed from the year ended September 30, 1947 as shown below under Adjustments to Net Income.

(k) An additional deduction of $43,232.98 has been allowed for New York State franchise tax.

Income Tax Computation—Alternative Tax

Net income for declared value excess profits tax computation adjusted		$ 282,869.25
Add: Long-term capital gain		10,321.38
Total		$ 293,190.63
Less: Declared value excess profits tax		none
Net income		$ 293,190.63
Less: Long-term capital gain		10,321.38
		$ 282,869.25
Less: Income subject to excess profits tax as shown below		237,136.90
Balance subject to normal tax and surtax		$ 45,732.35
Normal tax computation:		
$5,000.00 at 15%	$ 750.00	
15,000.00 at 17%	2,550.00	
5,000.00 at 19%	950.00	
20,732.35 at 31%	6,427.03	$ 10,677.03
Surtax computation:		
25,000.00 at 10%	$ 2,500.00	
20,732.35 at 22%	4,561.12	7,561.12
[fol. 25] Partial tax		$ 17,738.15
25% of long-term capital gain		2,580.34
Income tax liability		$ 20,318.49

Assessed:		
Original, Acc't #415100, May 1946 (3rd N.Y.)	$ 23,715.48	
Additional, Jan. 15, 1948, Spl. No. 12, Page 0, Line 2C	1,683.42	
Overassessment, Sch. No. IT:CB:7136 Suppl.	(928.92)	24,469.98
Overassessment of income tax		$ 4,151.49

Adjustment to Excess Profits Net Income Computed Under Invested Capital Credit Method

Excess profits net income as disclosed by return		$1,236,903.81
Addition:		
(a) 50% of interest on borrowed capital for year ended September 30, 1947	$ 13,361.68	
(b) Capital gain—year ended Sept. 30, 1945	10,321.38	
(c) Capital gain — year ended Sept. 30, 1947	3,300.00	26,983.06
Total		$1,263,886.87

Deductions:

(d) Net decrease in net income as shown under adjustments to net income above	$ 932,451.00	
[fol. 26] (e) Capital gain—year ended Sept. 30, 1945	10,321.38	
(f) Capital gain—year ended Sept. 30, 1947	3,300.00	
(g) Additional contributions on increased excess profits net income ($24,623.85 at 5%)	1,231.20	947,303.58
Excess profits net income adjusted		$ 316,583.29

Adjustment to Excess Profits Credit Based On Invested Capital

Invested capital as disclosed by return	$ 805,267.66
Deduction:	
(a) Accumulated earnings and profits	118,810.26
Invested capital as adjusted	$ 686,457.40

Explanation of Adjustment

(a) Accumulated earnings and profits at beginning of taxable year per return	$ 118,810.26
As corrected	none
Adjustment shown above	$ 118,810.26

Computation of Excess Profits Credit Based on Invested Capital

Invested capital as adjusted	$ 686,457.10
Excess profits credit (8% of $686,457.40	54,916.59

Excess Profits Tax Computation

Excess profits net income based on invested capital as shown above		$ 316,583.29
Less: Specific exemption	$ 10,000.00	
[fol. 27] Excess profits credit based on invested capital as shown above	54,916.59	
Unused excess profits credit from year ended Sept. 30, 1947 as shown below	14,529.80	79,446.39
Adjusted excess profits net income		$ 237,136.90
Surtax net income (before Sec. 26 (e) credit)		$ 293,190.63
80% of $293,190.63		$ 234,552.50
Income tax as shown above		20,318.49
Excess profits tax		$ 214,234.01
Less: 10% credit under Sec. 784		21,423.40
Excess profits tax liability		$ 192,810.61

Assessed:			
Original, Acc't #407101, May 1946 (3rd N. Y.)		$ 861,118.04	
Less: Credit allowed under Sec. 3806 (b)	$235,477.44		
Overassessment, Sch. #IT:CB:7136	612,042.13		
Overassessment. Sch. #IT:CB:7136 Suppl.	249,075.91		
		1,096,895.48	(235,477.44)
Deficiency of excess profits tax			$ 428,288.05

[fol. 28] Taxable Year Ended September 30, 1946

Adjustments to Net Income

Net income as disclosed by return		$(156,397.96)
Unallowable deductions and additional income:		
(a) Capital expenditures	$ 2,155.80	
(b) Entertaining expenses	1,198.83	
(c) Termination claims	20,206.20	
(d) Officer's salary	13,000.00	
(e) Contributions	131.25	36,692.08
Total		$(119,705.88)
Nontaxable income and additional deductions:		
(f) Depreciation	$ 4,359.30	
(g) New York State franchise tax	261.20	
(h) Renegotiation of war contracts	40,000.00	44,620.50
Net income for declared value excess profits tax computation, adjusted		$(164,326.38)

Explanation of Adjustments

(a) The amount of $2,155.80, representing capital expenditures included among the deductions in the return, is disallowed in accordance with the provisions of section 24(a) of the Internal Revenue Code.

(b) Entertaining expenses of $1,198.83 claimed among the deductions on the return are disallowed for lack of substantiation and failure to meet the other requirements of section 23(a) of the Internal Revenue Code.

[fol. 29] (c) The amount of $20,206.20, representing reimbursements received by you in the year ended September 30, 1947 by reason of the termination of government contracts, is held to constitute taxable income in this year, the year in which the value of your claims was determined, under the provisions of section 42 of the Internal Revenue Code since your returns are rendered on the accrual basis.

(d) It is held that a reasonable allowance for compensation for personal services rendered by Mrs. Madge Ferredy does not exceed $12,000.00 for the taxable year. The amount of $25,000.00 deducted in your return is accordingly disallowed to the extent of $13,000.00.

(e) Contributions of $131.25 deducted in your return are disallowed in accordance with the provisions of section 23(q) of the Internal Revenue Code since you sustained a net loss in this year.

(f) An additional depreciation deduction of $4,359.30 has been allowed.

(g) An additional deduction of $261.20 has been allowed for New York State franchise tax.

(h) To reduce net income per return by the amount of excessive profits arising from renegotiation of war contracts.

Adjustments to Excess Profits Net Income Computed Under Invested Capital Credit Method

Excess profits net income as disclosed by return		($147,201.91)
Deductions:		
(a) Net decrease in net income as shown under adjustments to net income above	$7,928.42	
[fol. 30] (b) 50% of interest on borrowed capital determined to amount to $8,076.26 in lieu of $9,196.05 reported	1,119.79	9,048.21
Excess profits net income adjusted		($156,250.12)

Adjustments to Excess Profits Credit Based on Invested Capital

Invested capital as disclosed by return		$873,424.24
Deductions:		
(a) Accumulated earnings and profits	$259,463.55	
(b) Average borrowed invested capital	30,174.52	289,638.07
Invested capital as adjusted		$583,786.17

Explanation of Adjustments

(a) Accumulated earnings and profits at beginning of taxable year per return	$259,463.55
As corrected	none
Adjustment shown above	$259,463.55
(b) Average borrowed invested capital per return	$301,460.69
As corrected	271,286.17
Adjustment shown above	$ 30,174.52

Computation of Excess Profits Credit Based on Invested Capital

Invested capital as adjusted	$ 583,786.17
Excess profits credit (8% of $583,786.17)	46,702.89

[fol. 31] Taxable Year Ended September 30, 1947

Adjustments to Net Income

Net income as disclosed by amended return		$(862,057.54)
Unallowable deduction and additional income:		
(a) Prepaid advertising	$52,152.66	
(b) Reserve for advertising	6,995.00	
(c) Capital expenditures	8,953.19	
(d) Entertaining expenses	4,639.43	
(e) Profit on sale of capital assets	3,300.00	76,040.28
Total		$(786,017.26)
Nontaxable income and additional deductions:		
(f) Depreciation	$	365.99
Net income adjusted		$(786,383.25)

Explanation of Adjustments

(a) The amount of $52,152.66, representing payments in advance for national advertising of vacuum cleaners in the subsequent year, which was included among the deductions claimed on the return, is disallowed on the ground that it does not constitute a proper deduction in this year under any of the provisions of the Internal Revenue Code.

(b) The amount of $6,995.00, representing an addition to a reserve for possible future advertising, which was included among the deductions on the return, is disallowed on the ground that it does not constitute a proper deduction in this year under any of the provisions of the Internal Revenue Code.

(c) The amount of $8,953.19, representing capital expenditures included among the deductions on the return, [fol. 32-36] is disallowed in accordance with the provisions of section 24(a) of the Internal Revenue Code.

(d) Entertaining expenses of $4,639.43 claimed among the deductions on the return are disallowed for lack of substantiation and failure to meet the other requirements of section 23(a) of the Internal Revenue Code.

(e) A profit of $3,300.00 realized by you on the sale of capital assets in the taxable year was erroneously omitted from income.

(f) An additional depreciation deduction of $365.99 has been allowed.

Computation of Excess Profits Credit Carry-Back
Based on Invested Capital

Amount paid in for capital stock	$250,000.00
25% of new capital	62,500.00
Average borrowed invested capital	408,066.99
Invested capital	$720,566.99
Excess profits credit (8% of $720,566.99)	$ 57,645.36
Excess profits credit carry-back (92/365 of $57,645.36)	$ 14,529.80

* * * * * * *

[fol. 37] The Tax Court of the United States

Lewyt Corporation, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

FINDINGS OF FACT AND OPINION—September 30, 1952

Held, the phrase "paid or accrued" as used in section 122(d)(6) of the Internal Revenue Code has reference to the system of accounting used by the taxpayer; *held further,* amounts tendered to the collector in 1947 by taxpayer as payment of additional excess profits taxes for 1943, 1944 and 1945 were not deductible in 1947.

FRED R. TANSILL, Esq., and EUGENE MEACHAM, Esq., for the petitioner.

ELLYNE E. STRICKLAND, Esq., for the respondent.

The taxpayer contests the following deficiencies determined by the Commissioner:

Taxable Year Ended	Tax	Amount
Sept. 30, 1944	Income	$ 7,129.21
Sept. 30, 1945	Excess Profits	428,288.05

The fiscal years ended September 30, 1946 and September 30, 1947 also are involved because of net operating losses sustained in those years which taxpayer contends were not properly computed before being carried back to [fol. 38] the taxable years. The Commissioner has asked an increased deficiency for the fiscal year ended September 30, 1945 based on what he now alleges was his improper allowance of a deduction of $55,949.04 claimed as interest on taxes paid during the fiscal year ended September 30, 1947. (References hereinafter to fiscal or taxable years are to the fiscal or taxable years of petitioner ending September 30 in the year or years mentioned.)

The following questions are presented for decision:

1. May excess profits taxes for 1945 which were paid in a stipulated amount within the fiscal year 1946 and excess profits taxes for 1943, 1944 and 1945 which were paid in

stipulated amounts within the fiscal year 1947, be added to the agreed net operating losses for the fiscal years 1946 and 1947 in computing the net operating loss carry-backs to the taxable years under the provisions of section 122(d)(6)?

2. Did certain amounts tendered by taxpayer to the collector of internal revenue on September 29, 1947 constitute payments of additional excess profits taxes for the fiscal years 1943, 1944, and 1945, within the fiscal year 1947?

3. Is taxpayer entitled to a deduction of $55,949.04 as interest paid or accrued during the fiscal year 1947?

4. May the amount of excess profits tax paid or accrued within the taxable year 1944 be used to reduce the net income for said year in computing the net operating loss carry-back from the fiscal year 1946 to the fiscal year 1945 under the provisions of section 122(b)(1)(A)(i)?

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Petitioner is a New York corporation, formed in 1942, engaged in the manufacture of vacuum cleaners and elec- [fol. 39] tronic devices. Its income and excess profits tax returns for the years involved were filed on the accrual method using a fiscal year ending each September 30, with the collector for the third district of New York.

For the fiscal years 1946 and 1947 petitioner incurred net operating losses of $164,326.38 and $786,383.25, respectively, not including any additions under section 122(d)(6).

During the fiscal year 1944 petitioner paid a total $759,-916.50 in excess profits tax which payments were made on petitioner's excess profits tax liability for the fiscal year 1943.

During the fiscal year 1945 petitioner paid a total of $510,939.23 on its excess profits tax liability for fiscal 1944.

Respondent determined petitioner's excess profits tax liability for fiscal 1944 to be $280,540.33 and its net income for the same year to be $420,540.43.

Petitioner's net operating losses for the fiscal years 1946 and 1947 in the respective amounts of $164,326.38 and $786,383.25 were allowable as carry-back deductions in the

fiscal years 1944 and 1945 and were so allowed by respondent.

Petitioner paid the excess profits tax liability shown on its return for the fiscal year 1945 during the fiscal year 1946 in the total amount of $861,118.04.

With reference to the fiscal year 1943 a dispute arose between petitioner and respondent. The major issue centered on whether the value of certain unfilled customers' orders and contracts which petitioner received by assignment from shareholders in two predecessor corporations were amortizable by petitioner and said amortization properly reflected as a deduction in cost of goods sold. Respondent by statutory notice dated August 30, 1946 asserted deficiencies against petitioner for the fiscal year 1943 of $7,757.49 in income tax and $194,992.51 in excess profits tax. These deficiencies were contested in a petition filed in this Court bearing docket No. 12526 on November 19, 1946. One of the errors assigned therein was the disallowance of the [fol. 40] above-described item. This question was placed in issue by respondent's answer filed December 23, 1946.

Petitioner's auditor was a certified public accountant experienced and qualified to act in tax matters. Both before and after the above proceeding was at issue attempts were made to settle the case. Conferences beginning about October 23, 1946 were held attended by the auditor and technical staff advisers. Petitioner's lawyers were present at some of the conferences. One such conference was held on September 26, 1947, and as a result the auditor believed that a basis for settlement had been arrived at for computing the additional tax due for the fiscal year 1943. On that basis the auditor recomputed the petitioner's tax liability and on September 29, 1947, petitioner addressed a letter to the collector transmitting petitioner's check payable to the collector for $190,002.16 and indicating it was for additional tax for fiscal 1943 in the amount of $154,473.30 and interest of $35,528.86. The letter bears a stamp showing receipt by a cashier in the collector's office for the third district of New York on September 29, 1947. The amount of this check was placed on September 29, 1947 in a suspense account maintained by the collector.

Subsequent conferences about the settlement of the

above case were held down to and including October 30, 1947. On November 6, 1947, the Head of the Technical Staff, New York Division, advised Division Counsel that settlement efforts on a satisfactory basis had proved ineffectual and defense of the case was recommended. On December 12, 1947, a written proposal of settlement was submitted by petitioner's attorney which the Technical Staff recommended on February 20, 1948, be accepted. A stipulation of settlement signed by the parties was filed with this Court on February 24, 1948. The stipulation showed that petitioner's excess profits tax liability for the taxable year 1943 was $140,147.87 and that petitioner had paid excess profits taxes on September 29, 1947 in the amount of $141,618.13, an overpayment of $1,470.26. This [fol. 41] Court entered its decision to that effect on March 3, 1948. The amount of $141,618.13 was part of the $190,-002.16 received by the collector on September 29, 1947 deposited in the above-mentioned suspense account.

Prior to September 30, 1947 and during that year a revenue agent was examining petitioner's returns for the years 1944, 1945, and 1946. This examination was expanded to include 1947. The amortization issue involved for the year 1943 was also present in 1944 and its disposition would affect the tax liability for 1945. Petitioner's auditor was in consultation with the agent and was advised of other proposed adjustments. The agent's report was dated July 26, 1948 and was forwarded to petitioner under date of August 25, 1948. Following the conference of September 26, 1947 referred to above, petitioner's auditor recomputed petitioner's tax liabilities for 1944 and 1945 on his understanding of the basis for settlement of the amortization question and giving effect to the other proposed adjustments mentioned to him by the agent.

On September 29, 1947, petitioner addressed a second letter to the collector transmitting petitioner's check payable to the collector in the amount of $178,810.92. The body of the letter stated:

Our check in the amount of One Hundred Seventy-Eight Thousand Eight Hundred and Ten Dollars and Ninety-Two Cents ($178,810.92) is computed as follows:—

Additional Tax—Year Ended September 30, 1944	$49,953.38	
Interest	8,492.07	
Total		$ 58,445.45
Additional Tax—Year Ended September 30th, 1945	$108,437.36	
Interest	11,928.11	
Total		$120,365.47
Grand Total		$178,810.92

This sum was received by the collector on September 29, 1947 and placed in the same suspense account with the $190,002.16.

[fol. 42] Petitioner charged the following amounts as taxes against earned surplus account in its books as of September 30, 1947:

For the Fiscal Year Ended Sept. 30, 1943	$154,473.30
For the Fiscal Year Ended Sept. 30, 1944	49,953.38
For the Fiscal Year Ended Sept. 30, 1945	108,437.36
Total	$312,864.04

The amount of $312,864.04 referred to in the preceding paragraph was reflected on the petitioner's Federal income tax return filed for the fiscal year ended September 30, 1947, as a charge against earned surplus.

Among the items petitioner charged as taxes against earned surplus account in its books as of September 30, 1947, there are three items totaling $312,864.04. The first of the three items is the amount of $154,473.30. This represents the additional tax liability of petitioner for the taxable year ended September 30, 1943, as recommended by its auditor and tendered by petitioner to the collector by check on September 29, 1947. Of this amount, $141,618.13 represented excess profits taxes and $12,855.17, income

taxes. The second item is the sum of $49,953.38, being the additional excess profits tax liability as recomputed by the auditor for the year ended September 30, 1944, and is the same amount shown in the letter transmitted to the collector of internal revenue on September 29, 1947, and tendered by check on the same day. Th third items is the additional excess profits tax liability as computed by the auditor for the taxable year ended September 30, 1945, and is in the sum of $108,437.36. This is the same amount referred to in the letter addressed to the collector of internal revenue dated September 29, 1947, and tendered by check dated the same day.

In one of the letters to the collector of internal revenue dated September 29, 1947, interest was computed and indicated in the sum of $35,528.86, and said amount of interest was included in the total amount of the check drawn pay-
[fol. 43] able to the collector of internal revenue in the total amount of $190,002.16.

In the second letter to the collector of internal revenue dated September 29, 1947, interest is indicated and computed in the amount of $8,492.07 on the additional tax for the year ended September 30, 1944, and in the amount of $11,928.11 on the additional tax for the year ended September 30, 1945. The check attached to said letter in the face amount of $178,810.92 drawn payable to the collector of internal revenue includes these two amounts.

Petitioner charged as an expense the following amounts as interest on taxes in its books for the fiscal year ended September 30, 1947:

For the Fiscal Year Ended Sept. 30, 1943	$35,528.86
For the Fiscal Year Ended Sept. 30, 1944	8,492.07
For the Fiscal Year Ended Sept. 30, 1945	11,928.11
Total	$55,949.04

The total of the three interest items referred to in the amount of $55,949.04 is the total of the amounts referred to in the two letters of September 29, 1947, and is the same amount deducted on the petitioner's books as of September 30, 1947.

The amount of $55,949.04 referred to in the preceding paragraph was claimed, together with other amounts, as

an interest deduction on the petitioner's Federal income tax return filed for the fiscal year ended September 30, 1947, which interest deduction was not adjusted or reduced by the respondent in his revenue agent's report.

Petitioner did not file any amended returns showing greater liability in income and excess profits taxes for the fiscal years ended September 30, 1944, and September 30, 1945, and no deficiency in tax for either of those years was asserted or determined by the Commissioner until after the close of the fiscal year ended September 30, 1947.

[fol. 44] OPINION

Tietjens, *Judge*: As we understand it, from opening statements of counsel and the briefs filed herein, the question upon which disposition of most of the issues herein depends is the construction of the words "paid or accrued within the taxable year" as they appear in section 122(d)(6) quoted in the footnote.[1] The "rules" referred to in that section are not material to the issue except as may be indicated hereafter. The taxes imposed by subchapter E of chapter 2 are "excess profits taxes" and that term will be used for convenience. The question is urged by taxpayer as one of first impression.

Taxpayer admittedly maintained its books and records and filed its tax returns using a fiscal year and computed its net income using the accrual method of accounting. Nevertheless, it contends that in applying section 122(d)(6) it is entitled to use, with reference to the year 1946, the amount actually paid in that year in satisfaction of its excess profits tax liability for the year 1945. A similar con-

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[1] SEC. 122. NET OPERATING LOSS DEDUCTION.

* * * * * * *

(d) Exceptions, Additions, and Limitations.—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * * * * * *

(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

tention is made for the year 1947 during which certain

amounts were tendered to the collector as additional excess profits tax for the years 1943, 1944, and 1945. And for the year 1944, the argument is made that taxpayer is entitled not only to use, in making adjustments required under section 122(b)(1)(A)(i),[2] the amount of excess profits taxes [fol. 45] "paid" in 1944 on the liability for the previous year, but is also entitled to add to that amount at least $280,540.33 (its ultimate excess profits tax liability for 1944) which was "paid" in 1945.

In arriving at these conclusions taxpayer argues that the phrase "paid or accrued within the taxable year" refers "to the fact that an excess profits tax liability has arisen or that such a liability has been liquidated by payment" in the taxable year. On the other hand, the Commissioner refers to section 48(c)[3] and says that consonant therewith

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[2] SEC. 122. NET OPERATING LOSS DEDUCTION.

* * * * * * *

(b) Amount of Carry-Back and Carry-Over.—

(1) Net Operating Loss Carry-Back.—

(A) Loss for Taxable Year Beginning Before 1950.—If for any taxable year beginning after December 31, 1941, and before January 1, 1950, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed—

(i) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and

* * * * * * *

[3] SEC. 48. DEFINITIONS.

When used in this chapter—

* * * * * * *

(c) "Paid or Incurred," "Paid or Accrued".—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

the phrase should be construed according to taxpayer's method of accounting.

The phrase is not defined either in section 122 itself or in the regulations issued thereunder. Neither do we think the legislative history of the section which is analyzed in the taxpayer's briefs and which we have diligently studied throws any light on the question.

It is noted that the Revenue Act of 1941 added a new subparagraph (2) to section 23(c) of the Code permitting a direct deduction for excess profits taxes paid or accrued within the taxable year. Thereafter, section 105 of the Revenue Act of 1942 withdrew this deduction and at the same time added the new provision — section 122(d)(6) which is in question here. A comparison of section 23(c) with section 122(d)(6) follows.

[fol. 46] Sec. 23, I. R. C.

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

• • •

(c) Taxes Generally.—

(1) Allowance in general.—Taxes paid or accrued within the taxable year, except—

• • •

(2) Excess-profits tax under chapter 2E—Special rules.—For the purposes of this subsection, in the case of the excess-profits tax imposed by Subchapter E of Chapter 2—

(A) The deduction shall be limited to the tax imposed for the taxable year, but any portion of such tax paid after the taxable year shall be considered as having been paid within the taxable year;

(B) No reduction in such tax shall be made by reason of the credit for income, war-

Sec. 122 (d), I. R. C.

"(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

. . . . . .

(A) No reduction in such tax shall be made by reason of the credit for income, war-profits,

Sec. 23, I. R. C.	Sec. 122 (d), I. R. C.
profits, or excess-profits taxes paid to any foreign country or possession of the United States;	or excess-profits taxes paid to any foreign country or possession of the United States;
(C) Such tax shall be computed without regard to the adjustments provided in section 734; and	(B) Such tax shall be comput'd without regard to the adjustments provided in section 734; and
(D) Such tax, in the case of a consolidated return under section 730, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary."	(C) Such tax, in the case of a consolidated return for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary."

[fol. 47] It will be seen that Rule (A) of section 23(c)(2) which had the effect of putting all taxpayers, regardless of cash or accrual basis on an accrual basis as far as the excess profits tax deduction was concerned, was omitted from the new section 122(d)(6). The taxpayer here infers from this that Congress must have intended not to place all taxpayers on an accrual basis. We do not clearly see how this inference helps the taxpayer, since it can be just as effectively argued as an inference that the ommission was intended to place each upon its method of accounting, though it may be true, as taxpayer says, that this might lead to inequitable results since accrual basis taxpayers would normally not be in position to accrue an excess profits tax liability in a loss year. However that may be, the omission is unexplained in the legislative history and we must take the section as we find it.[4]

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[4]This controversy has been anticipated by writers on tax problems. See J. K. Lasser, Excess Profits Tax Controversies, New York University Fourth Annual Institute on Federal Taxation, 806, 808, where he says with reference to section 122: "There is also some confusion as to the adjustment to be made for excess profits taxes 'paid or accrued within the taxable year.' This adjustment increases the net operating loss carryover. Some say that the adjustment is ordinarily available only to cash basis

To bolster its position that "paid or accrued" should be given a broader construction than merely referring to accounting systems, taxpayer cites *Commissioner* v. *Clarion Oil Co.*, 148 F. 2d 671, reversing 1 T. C. 751, which involved, among other issues, the interpretation of the terms "paid or accrued" as used in the Personal Holding Company provisions of the Internal Revenue Code. See sections 505 (a)(1) and 507(a). We think the rule there applied rests upon the peculiar nature of the problem of determing the *undistributed income* on which the penalty tax was levied [fol. 48] and should not be extended to the present controversy. In passing, we point out that only recently has this Court concluded to follow *Commissioner* v. *Clarion Oil Co., supra, Wm. J. Lemp Brewing Company*, 18 T. C. (No. 70.).

Despite taxpayer's belief that the present case is one of first impression, the Commissioner cites and relies on *Estate of Julius I. Byrne*, 16 T C. 1234. One of the issues in that case was petitioner's claim under section 122 that its net operating loss carry-back from 1945 should be increased by the amount of its excess profits taxes for 1944 which were paid in 1945. This claim was based on petitioner's allegation that its returns were filed on the cash basis. We held that petitioner had failed to prove it was on

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taxpayers, since no excess profits taxes would accrue in the year of the net operating loss except in very rare cases. But others argue strenuously that this would be an undue discrimination against accrual basis taxpayers, and that the words 'paid or accrued' permit accrual basis companies to make the adjustment for taxes accrued during the prior year but paid during the year of the net operating loss. This could produce very odd results in some cases, and the question will have to await further clarification."

Also see footnote to Jacquin D. Bierman, Excess Profits Net Income for the Current Taxable Year, New York University Tenth Annual Institute on Federal Taxation, 231, at page 245: "It might be noted, in passing, that *cash basis* taxpayers can no longer add to the net operating loss the excess profits tax paid during the year of the loss. See Section 304(e) of Excess Profits Tax Act of 1950 repealing Section 122(d)(6) for years ending after June 30, 1950." [Emphasis supplied.]

the cash basis, and "as a consequence, it has failed to show that it is entitled to deduct the excess profits taxes for 1944 in computing the 1945 carry-back. It did not owe any excess profits taxes for 1945 and did not accrue any." In other words, an accrual basis taxpayer cannot increase its net operating loss carry-back for a particular year by adding in the amount of excess profits taxes paid in that year on its liability for the previous year. This case seems to us squarely to confirm the Commissioner's contentions here, and we hold that in making the computations called for under section 122(d)(6) the phrase "paid or accrued" should be construed according to the method of accounting upon the basis of which taxpayer's net income is computed.

This would dispose of the case were it not for taxpayer's alternate contention with reference to the amounts tendered to the collector in 1947. As to these amounts taxpayer argues, that, accepting the interpretation we have put on the controversial phrase, nevertheless, the amounts paid to the collector in 1947 were properly accrued in that year notwithstanding they represented additional excess profits taxes for prior years. The argument goes that the additional taxes were in dispute—those for 1943 by virtue of the petition filed with this Court—those for 1944 because their amount depended upon a recurring issue present in [fol. 49] the Tax Court case, and those for 1945 because excess profits credits and franchise taxes for that year were not knowable until the disputes for the prior years had been resolved. Further, that the amounts received by the collector on September 29, 1947 constituted tax payments which an accrual basis taxpayer was required to deduct not later than the date of payment.

We think the Commissioner must be sustained on this point, even though taxpayer's liability for 1943 was contested by the filing of a petition in this Court. True, that effectively postponed its right to accrue the contested liability under the principles enunciated in *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516. And it is established that when an accrual basis taxpayer pays all or part of the contested liability, that taxpayer is required to deduct the amounts paid in the year of payment. *Chestnut Securities Co.* v. *United States*, (Ct. Cls.) 62 F. Supp. 574; *Lehigh Valley Railroad Co.*, 12 T. C. 977.

The troublesome point is whether the amounts tendered to the collector on September 29, 1947 representing estimated additional taxes for 1943, 1944, and 1945 constituted "tax payments" or "taxes paid" in 1947 and were thus properly deductible in 1947. We are of the opinion the answer should be "no".

As far as the amount for 1943 is concerned the taxpayer concluded that an acceptable formula for settling its Tax Court case had been found. But the amount determined pursuant to the formula was turned over to the collector in 1947 and deposited by him in a "suspense account". The Tax Court case was not by this means settled or determined. Further conferences were held respecting the pending settlement after the formula was arrived at, and as late as November 6, 1947 the Technical Staff was recommending defense of the case to the Division Counsel. Both the taxpayer and the Commissioner were still free to pursue the contest of the 1943 liability and neither was foreclosed on that score at least till the stipulation disposing of the case was signed on February 24, 1948 after the [fol. 50] Technical Staff had recommended that this be done on February 20, 1948. Under the facts of this case petitioner is not entitled to deduct the amount tendered for 1943 taxes in 1947.

Nor does the record before us furnish any basis for allowing taxpayer to deduct in 1947 the amounts tendered to the collector purportedly representing additional excess profits taxes for 1944 and 1945. The taxpayer filed no amended returns showing greater liability in income and excess profits taxes for 1944 and 1945 and no deficiencies in tax for either of those years were asserted or determined by the Commissioner until after the close of fiscal 1947. The most that can be said is that an audit was under way involving those years. True, it probably appeared to the taxpayer that there would be additional taxes due, but nothing definitive had developed. The revenue agent's report covering 1944 and 1945 was not forwarded to taxpayer until August 25, 1948. In these circumstances the taxpayer cannot take deduction for these amounts in 1947. See *Rosenman* v. *United States*, 323 U. S. 658; *Roles* v. *Earle*, (C. A. 9, 1952), F. 2d , which indicate

that none of the amounts tendered in 1947 and placed in the suspense account in that year constitute "taxes paid". We accordingly hold that the amounts paid over by taxpayer to the collector in 1947 cannot be deducted in that year.

The parties are agreed that our decision as to the principal amounts involved will govern the treatment to be accorded the interest payment made and consequently no discussion of that question will be necessary.

With reference to issue 4 set out in the preliminary statement hereto, petitioner states on brief that it, as well as issues 1 and 2, turns "upon the meaning to be placed on the same identical phrase", i.e., "paid or accrued". The Commissioner in his brief has addressed no argument specifically to this issue and we take it that the interpretation which we have above given to the critical phrase will also dispose of this question.

Reviewed by the Court.

Decision will be entered under Rule 50.

[fols. 51-107] BEFORE THE TAX COURT OF THE UNITED STATES

Washington

[Title omitted]

DECISION—April 9, 1953

Pursuant to the determination of this Court, as set forth in its Findings of Fact and Opinion promulgated September 30, 1952, the respondent and the petitioner each duly filed a proposed computation of tax in accordance therewith. After hearing thereon and careful consideration of the arguments made in the written briefs filed by the parties, the respondent's computation is approved, and it is therefore

ORDERED AND DECIDED: That there is a deficiency in income tax of $7,129.21 for the taxable year ended Sep-

tember 30, 1944; and that there is a deficiency in excess profits tax of $466,557.19 for the taxable year ended September 30, 1945.

Enter:

(Signed.) Norman O. Tietjens, Judge.

Entered Apr 9, 1953.

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* * * * * * *

[fol. 108] BEFORE THE TAX COURT OF THE UNITED STATES

[Title omitted]

STIPULATION OF FACTS—Filed October 30, 1951

Come now the above-named parties to this proceeding, and through their respective counsel of record stipulate and agree that the following facts are to be admitted into evidence as true, subject, however, to the right of either party to introduce further evidence not inconsistent with anything stipulated herein:

1. Petitioner is a New York Corporation with its principal office at 60 Broadway, Brooklyn 11, New York. It was formed on December 30, 1942.

2. Petitioner is and was a manufacturer of vacuum cleaners and electronic devices.

3. Respondent has determined deficiencies as follows:

Year Ended	Type of Tax	Amount
September 30, 1944	Income	$ 7,129.21
September 30, 1945	Excess Profits	428,288.05

Also involved in this proceeding are the fiscal years ended September 30, 1946, and September 30, 1947, in each of which fiscal years net operating losses were sustained by the petitioner which affect the taxable years.

[fols. 109-110] Petitioner filed its income tax returns and excess profits tax returns for the taxable years here involved and for the years ended September 30, 1946, and September 30, 1947, with the Collector for the Third Dis-

trict of New York. Petitioner maintained its books and records and filed its tax returns on the accrual method of accounting, using a fiscal year ending each September 30th.

5. For the fiscal year ended September 30, 1946, petitioner incurred a net operating loss, in the amount of $164,326.38, which amount does not include any additions under Section 122 (d) (6) of the Internal Revenue Code.

6. For the fiscal year ended September 30, 1947, petitioner incurred a net operating loss in the amount of $786,383.25, which amount does not include any additions under Section 122 (d) (6) of the Internal Revenue Code.

7. Petitioner paid a total of $759,916.50 in excess profits tax during the taxable year ended September 30, 1944, which payments were made on petitioner's excess profits tax liability for the fiscal year ended September 30, 1943, as shown on its excess profits tax return for said fiscal year.

8. Petitioner paid a total of at least $453,049.29 on its excess profits tax liability for the year ended September 30, 1944, which amount was paid during the taxable year ended September 30, 1945.

9. Petitioner paid the excess profits tax liability shown on its federal excess profits tax return for the fiscal year ended September 30, 1945, during the fiscal year ended September 30, 1946, in the total amount of $861,118.04.

* * * * * * *

[fols. 111-136] Fred R. Tansill, Counsel for Petitioner. (Signed) Charles Oliphant, R. P. H., Counsel for Respondent.

[fols. 137-187] Before the Tax Court of the United States

[Title omitted]

Supplemental Stipulation of Facts—Lodged December 18, 1951

Come now the above-named parties to this proceeding, and through their respective counsel of record stipulate and agree that the following facts are to be admitted in evidence as true, as paragraph 8 of the Stipulation of Facts, in lieu

of paragraph 8 as it originally appeared in the Stipulation of Facts:

8. Petitioner paid a total of $510,939.23 on its excess profits tax liability for the year ended September 30, 1944, which amount was paid during the taxable year ended September 30, 1945.

(S.) Fred R. Tansill, Counsel for Petitioner, 824 Connecticut Avenue, N. W., Washington 6, D. C. (Sgd.) Mason B. Leming, R. P. H., Counsel for Respondent.

[fols. 188-189] Before the Tax Court of the United States

PETITIONER'S EXHIBIT 19, ADMITTED IN EVIDENCE

United States Corporation Excess Profits Tax Return for Fiscal Year Ending September 30, 1944.

(Here follows 2 Photolithographs, side folios 189, 189a)

[213]

Computation Proved

Form 1121
Treasury Department
Internal Revenue Service

UNITED STATES
CORPORATION EXCESS PROFITS TAX RETURN
For Calendar Year 1943

or fiscal year beginning Oct. 1, 1943, and ending Sept. 30, 1944

1943

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

LEVITT CORPORATION
(Name)

431 East 52nd Street
(Street and number)

New York 22 (City or Town) N. Y. (State)

Business group serial number entered on page 1, Form 1120 57

Fed. Ex. Code 8 5-2
Serial No. 2 407342
District

1945 FEB

Cash Check M. O.
Tax Stamps

3405.12

POST-WAR CREDIT AND REFUND BRANCH C:CC-2

THE TAX COURT OF THE U.S.
DOCKET 2-8151
ADMITTED IN EVIDENCE
OCT 30 1951
PETITIONER'S
EXHIBIT 19
RESPONDENT'S

REPORTED
FEB 15 1945

EXCESS PROFITS TAX COMPUTATION

		Column 1 Income Credit Method	Column 2 Invested Capital Credit Method
1.	Excess profits net income (line 16, Schedule A)	$	$ 827,852.99
2.	Specific exemption	$ 5,000	$ 5,000
3.	Excess profits credit—based on income (line 46, Schedule B)	x x x x x x x x	x x x x x x x x
4.	Excess profits credit—based on invested capital (line 41, Schedule C)	x x x x x x x x	76,629.91
5.	Unused excess profits credit adjustment (attach schedule)		
6.	Total of items 2 to 5		$ 81,629.91
7.	Difference between item 1 and item 6		$ 746,223.08
8.	Adjusted excess profits net income (item 7, column 1 or item 7, column 2, whichever is applicable)		$ 746,223.08
9.	90 percent of item 8		$ 671,600.77
10.	Net income (computed without regard to the specific exemption provided by section 26 (e)) (item 35, page 2, Form 1120)		$ 817,680.90
11.	Less: (a) Dividends received credit (85 percent of amount in column 2, Schedule E, Form 1120) (excluding dividends received on certain preferred stock of public utility), but not in excess of 85 percent of item 10 above)		
	(b) Dividends paid on certain preferred stock of public utility (line 20, page 2, Form 1120)		
12.	Surtax net income (computed without regard to the credit provided by section 26 (b))		$ 817,680.90
13.	80 percent of item 12		654,144.72
14.	Income tax under Chapter 1 (other than tax computed under section 102) for taxable year (item 41, page 1, Form 1120)		28,583.13
15.	Excess of item 13 over item 14		$ 625,561.59
16.	Item 9, or item 15, whichever is lesser		$ 625,561.59
17.	Amount deferred by reason of the application of section 710 (a) (1) (B) (relief from abnormality under section 722) (attach schedule)		$
18.	Excess profits tax:		
	(a) Item 16 minus item 17	$ 625,561.59	
	(b) If schedule is filed under question (g), page 2, amount of tax at corresponding schedule		
	(c) Item 18 (a) or item 18 (b), whichever is applicable		$ 625,561.59
19.	Less: Credit for income taxes paid to a foreign country or United States possession allowed to a domestic corporation (portion not used in computing item 42, page 1, Form 1120)		
20.	Item 18 (c) minus item 19		$ 625,561.59
21.	Less: Credit for debt retirement (item 28, below)		20,000.00
22.	Item 20 minus item 21		$ 605,561.59
23.	Amount, if any, due to application of section 734 (adjustment in case of position inconsistent with prior income tax liability) (attach schedule)		
24.	Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)		$ 605,561.59

POST-WAR REFUND OF EXCESS PROFITS TAX AND CREDIT FOR DEBT RETIREMENT

25.	Balance of excess profits tax (item 18 (c), above)		$ 625,561.59
26.	Credit allowable under sections 780 and 781 (10 percent of item 25) (but in cases where item 19 is applicable, see Specific Instructions 26-27)		$ 62,556.16
27.	Lesser of amounts paid on indebtedness or net reduction in indebtedness under section 783 (b) (2)	$ 50,000.00	
28.	Credit for debt retirement allowable under section 783 (40 percent of item 27, but not in excess of 10 percent of item 25)		20,000.00
29.	Net post-war refund credit (item 26 minus item 28) Subject to Reconciliation attached		$ 42,556.16

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 12th day of February, 1945

NOTARIAL SEAL — HENRIETTA B. ROSENBERG, NOTARY PUBLIC, Kings Co. Clk's No. 470, Reg. No. [illegible], N. Y. Co. Clk's No. 470, Reg. No. [illegible], Commission Expires March 30, 1945 — (Title)

(President or other principal officer) (State this)

CORPORATE SEAL

(Treasurer, Assistant Treasurer, or Chief Accounting Officer) (State this)

I/we swear (or affirm) that I/we prepared this return for the above named person and that the statements contained herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of the excess profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 12th day of February, 1945

NOTARIAL SEAL — HENRIETTA B. ROSENBERG, NOTARY PUBLIC, Kings Co. Clk's No. 470, Reg. No. [illegible], N. Y. Co. Clk's No. [illegible], Commission Expires March 30, 1945 — (Title)

Walter Leidman
(Signature of person preparing the return)

(Signature of person preparing the return)

Allison I. Brown
(Address) (Name of firm or employer, if any)

QUESTIONS

(a) Date of incorporation December, 1942 (b) State or country New York

(c) Collector's office in which your income tax return for the taxable year was filed 3rd. New York

(d) Is this a consolidated return? No If so, procure from the collector Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of the consolidated income tax return.

(e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, reduced by the amount of amortizable bond premium under section 125 attributable to, all Government obligations described in section 22(b)(4) of the Internal Revenue Code? (Answer "yes" or "no") Yes

(f) Are you a transferor or transferee upon an exchange as defined by section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") No

(g) Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (1) below? (Answer "yes" or "no") No If answer is "yes":

(1) Check the appropriate sections and submit schedules showing computation: 710(a)(4) ☐; 721 ☐; 726 ☐; 731 ☐; 735(b) ☐; 735(c) ☐; 736(a) ☐; 736(b) ☐. (See General Instructions E, F, G, H, and I.) (Enter amount of excess profits tax as Item 18 (b), page 1.)

(2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following sections: 721, $ .....; 726, $.....; 731, $.....

(3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following sections: 721, $.....; 731, $.....; 735(b), $.....; 735(c), $.....

(h) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), $.....

Schedule A.—EXCESS PROFITS NET INCOME COMPUTATION

Line No.		Column 1 Income Credit Method		Column 2 Invested Capital Credit Method
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 27, page 1, Form 1120)	$		$ 817,680.90
2.	Net short-term capital gain (do not enter net short-term capital loss)			
3.	Adjustment to net operating loss deduction			
4.	Decrease in deductions limited by income			
5.	50 percent of interest on borrowed capital	x x x x x x x	x x	10,172.00
6.	Interest on Government obligations (see question (e) above, for election)	x x x x x x x	x x	
7.	Total of lines 1 to 6	$		$ 827,852.90
8.	Net gain from sale or exchange of capital assets (item 12 (a), page 1, Form 1120)	$		$

or "no") ..... If answer is "yes":

(1) Check the appropriate sections and submit schedules showing computation: 710(a)(4) ☐; 721 ☐; 726 ☐; 731 ☐; 735(b) ☐; 735(c) ☐; 736(a) ☐; 736(b) ☐. (See General Instructions E, F, G, H, and I.) (Enter amount of excess profits tax as Item 18 (b), page 1.)

(2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following sections: 721, $ .....; 726, $.....; 731, $.....

(3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following sections: 721, $.....; 731, $.....; 735(b), $.....; 735(c), $.....

(h) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), $.....

Schedule A.—EXCESS PROFITS NET INCOME COMPUTATION

Line No.		Column 1 Income Credit Method		Column 2 Invested Capital Credit Method
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 27, page 1, Form 1120)	$		$ 817,680.90
2.	Net short-term capital gain (do not enter net short-term capital loss)			
3.	Adjustment to net operating loss deduction			
4.	Decrease in deductions limited by income			
5.	50 percent of interest on borrowed capital	x x x x x x x	x x	10,172.00
6.	Interest on Government obligations (see question (e) above, for election)	x x x x x x x	x x	
7.	Total of lines 1 to 6	$		$ 827,852.90
8.	Net gain from sale or exchange of capital assets (item 12 (a), page 1, Form 1120)	$		$
9.	Income from retirement or discharge of bonds, etc.			
10.	Refunds and interest on Agricultural Adjustment Act taxes			
11.	Recoveries of bad debts			
12.	Increase in deductions limited by income			
13.	(a) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)			x x x x x x x x x
	(b) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)	x x x x x x x	x x	
14.	Nontaxable income of certain industries with depletable resources			
15.	Total of lines 8 to 14	$		$ 827,852.90
16.	Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15)	$		$
17.	Deductions applicable to life insurance companies			
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$		$ 827,852.90

[fol. 190] Lewyt Corporation

431 East 52nd Street, New York 22, N. Y.

Form 1121—Page 4—Line 29—Average Borrowed Capital

	Days		
Oct. 1, 1943 to June 30, 1944	274	$621,750.42	$170,359,615.08
July 1, 1944 to Sept. 11, 1944	73	821,750.42	59,987,780.66
Sept. 12, 1944 to Sept. 29, 1944	18	921,750.42	16,591,507.56
Sept. 30, 1944	1	871,750.42	871,750.42
Totals	366		$247,810,653.72
Average Borrowed Capital			$ 677,078.29

Lewyt Corporation

431 East 52nd Street, New York 22, N. Y.

Fiscal Year Ended Sept. 30, 1944

Tentative Tax Computed Under Revenue Act of 1943

Excess Profits Taxes

Excess Profits Net Income		$827,852.99
Less—Excess Profits Credit	$ 76,629.91	
Specific Exemption	10,000.00	86,629.91
Adjusted Excess Profits Net Income		$741,223.08
95%		$704,161.93
Net Income before deducting Income subject to Excess Profits Tax		$817,680.90
80%		654,144.72
Less Normal & Surtax		30,583.13
Excess Profits Tax—Tentative		$623,561.59

Normal Tax & Surtax

Net Income	$817,680.90	
Less Income subject to Excess Profits Tax	741,223.08	
Normal Tax & Surtax Net Income		$ 76,457.82
Normal Tax 24%	$ 18,349.88	
Surtax 16%	12,233.25	
Toral Normal Tax & Surtax—Tentative		$ 30,583.13

[fol. 191]

Recapitulation

Normal Tax & Surtax			
92/365 of Tentative Tax under Revenue Act of 1942	$ 28,583.13	$ 7,204.51	
273/365 of Tentative Tax under Revenue Act of 1943	30,583.13	22,874.50	
Total Normal Tax & Surtax			$ 30,079.01
Excess Profits Tax			
92/365 of Tentative Tax under Revenue Act of 1942	$625,561.59	$157,675.80	
273/365 of Tentative Tax under Revenue Act of 1943	623,561.59	466,389.91	
Total Excess Profits Tax			$624,065.71
Less Credit for Debt Retirement (40% of $50,000.00)			20,000.00
Net Excess Profits Tax			$604,065.71
Post War Refund			
10% of Excess Profits Tax of $624,065.71	$ 62,406.57		
Less Credit for Debt Retirement	20,000.00		
Post War Refund		$ 42,406.57	

[fol. 192] Office of the Collector
Third District of New York
110 East 45th Street—Room 418
In reply refer to IT:GHS

Treasury Department
Internal Revenue Service
New York, N. Y. 17

December 14, 1944
This Extention Does Not Extend
The Time for Filing Form 1120

Lewyt Corporation
c/o Alson & Brown
285 Madison Ave. NYC

Gentlemen:

Receipt is acknowledged of your application of recent date requesting an extension of time to file your Corporaton Excess Profits Tax Return, Form 1121, coverng the year ended 9/30/44.

An extension of time within which to file your Form 1121 is hereby granted you under the following conditions:

That You File a Tentative Return On Or Before Dec. 26, 1944 and Your Completed Return On Or Before Feb. 15, 1945.

Tentative Return is not required if there will be no tax due on completed return.

A payment of at least one-fourth of the estimated tax shall be made with the Tentative Return. Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a Tentative Return is meant a return on the appropriate income tax form showing only the name and address of the taxpayer and the estimated amount, if any, of tax due. Items and schedules shown on the form need not be [fol. 193] filled in. However, the enclosed statement must be attached to the tentative return.

This letter must be attached to the Tentative Return and the copy to the Completed Return as authority for the extension of time herein granted.

It is imperative that both the Tentative and Completed Returns be filed with the Collector of Internal Revenue, Third District of New York, 110 East 45th Street, New York, New York (17).

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner of Internal Revenue.
By: JAMES W. JOHNSON,
Collector of Internal Revenue.

Lewyt Corporation

Year Ended September 30, 1944

Income Tax Computation Corrected

	1943 Rates	1944 Rates	Aggregate
Net income per return	747,236.60	747,236.60	
Less: Income subject to excess profits tax	675,778.78	670,778.78	
Normal & surtax net income	71,457.82	76,457.82	
Normal tax at 24%	17,149.88	18,349.88	
Surtax at 16%	11,433.25	12,233.25	
Tentative income tax	28,583.13	30,583.13	
Tax at 1943 rates 92/366 of 28,583.13	7,184.83		
Tax at 1944 rates 274/366 of 30,583.13		22,895.57	
Total income tax			30,080.40

[fol. 194]

Excess Profits Tax Computation Corrected

Net income	747,236.60	747,236.60	
Add: 50% of Int. on borrowed capital	10,172.09	10,172.09	
Excess profits net income	757,408.69	757,408.69	
Less: Specific exemption	5,000.00	10,000.00	
Excess profits credit	76,629.91	76,629.91	
8. Adjusted excess profits net income	675,778.78	670,778.78	
9. 90 & 95% of item 8	608,200.90	637,239.84	
12. Surtax net income	747,236.60	747,236.60	
13. 80% of item 12	597,789.28	597,789.28	
14. Tentative income tax under Chapter 1	28,583.13	30,583.13	
15. Excess of item 13 over item 14	569,206.15	567,206.15	
Tentative excess profits tax (lesser of item 9 or item 15)	569,206.15	567,206.15	
Tax at 1943 rates 92/366 of 569,206.15	143,079.14		
Tax at 1944 rates 274/366 of 567, 206.15		424,629.74	
Total excess profits tax			567,708.88
Less: Credit for debt retirement			20,000.00
Excess profits tax due			547,708.88

Computation of Credit Under Section 3806(b)

Net income per amended return	747,236.60
Less: Excessive profits on renegotiation	397,970.00
Net income after renegotiation	349,266.60
Less: 10% of ($15,000,000.00) D. V. Capital Stock	1,500,000.00
Balance subject to D. V. E. P. tax	None

[fol. 195]

Income Tax Computation

Net income revised	349,266.60	349,266.60	
Less: Income subject to excess profits tax	277,808.78	272,808.78	
Normal and surtax net income	71,457.82	76,457.82	
Normal tax at 24%	17,149.88	18,349.88	
Surtax at 16%	11,433.25	12,233.25	
Tentative income tax	28,583.13	30,583.13	
Tax at 1943 rates 92/366 of $28,583.13	7,184.83		
Tax at 1944 rates 274/366 of $30,583.13		22,895.57	
Total income tax			30,080.40

Excess Profits Tax Computation

	1943 Rates	1944 Rates	Aggregate
Net income revised	349,266.60	349,266.60	
Add: 50% of Interest on borrowed capital	10,172.09	10,172.09	
Excess Profits net income	359,438.69	359,438.69	
Less: Specific exemption	5,000.00	10,000.00	
Excess profits credit	76,629.91	76,629.91	
8. Adjusted excess profits net income	277,808.78	272,808.78	
9. 90 & 95% of item 8	250,027.90	259,168.34	
12. Surtax net income before credits	349,266.60	349,266.60	
13. 80% of item 12	279,413.28	279,413.28	
14. Tentative income tax under Chapter 1	28,583.13	30,583.13	
15. Excess of item 13 over item 14	250,830.15	248,830.15	
Tentative excess profits tax (lesser of item 9 or item 15)	250,027.90	248,830.15	
Tax at 1943 rates 92/366 of $250,027.90	62,848.54		
Tax at 1944 rates 274/366 of $248,830.15		186,282.67	
Total excess profits tax			249,131.21
Less: Credit for retirement (40% of $50,000.00)			20,000.00
Excess profits tax due			229,131.21

[fol. 196]

Comparison of Tax Computations

		Return Corrected	Revised	Difference = Tax on Excessive Profits of $397,970.00
Income tax	(Ch. 1)	30,080.40	30,080.40	—
D. V. E. P. tax	(Ch. 2B)	None	None	
Excess profitx tax	(Ch. 2E)	547,708.88	229,131.21	318,577.67
Totals		577,789.28	259,211.61	318,577.67

Post-War Refund of Excess Profit Tax

Excess profits tax	249,131.21
Credit allowance, 10%	24,913.12
Less: Credit for debt retirement (40% of $50,000.00)	20,000.00
Net post-war refund credit	4,913.12

[fol. 197]

Computation of Credit Under Section 3806(b)

Net income per amended return	747,236.60
Less: Excessive profits on renegotiation	397,970.00
Net income after renegotiation	349,266.60
Less: 10% of ($15,000,000.00) D. V. Capital stock	1,500,000.00
Balance subject to D. V. E. P. tax	None

Normal & Surtax Computation

No adjustment made

Excess Profits Tax Computation

	1943	1944
Excessive profits on renegotiation	397,970.00	397,970.00
Excess profits tax at 90% & 95%	358,173.00	378,071.50
Apportionment		
92/366 of $358,173.00	90,032.56	
274/366 of 378,071.50		283,037.13
Total excess profits tax on excessive profits of 397,970.00		373,069.69

[fols. 198-199] Schedule B—Excess Profits Credit—Based on Income.

(Here follows 1 Photolithograph, side folio 198-199)

Schedule B.—EXCESS PROFITS CREDIT—BASED ON INCOME

TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1939, AND BEFORE JANUARY 1, 1940
(If additional columns are required, attach separate schedule)

Line No.		1. Year Ended ____, 19__	2. Year Ended ____, 19__	3. Year Ended ____, 19__	4. Year Ended ____, 19__
1.	Normal-tax (or special-class) net income	$	$	$	$
2.	Net capital loss used in computing line 1				
3.	Securities which are capital assets deducted in computing line 1 as bad debts or as stock determined to be worthless (for taxable years beginning prior to January 1, 1938)				
4.	Net loss from sale or exchange of property other than capital assets deducted in computing line 1 (for taxable years beginning after December 31, 1937)				
5.	Net loss from involuntary conversion of property deducted in computing line 1				
6.	Total of lines 1 to 5	$	$	$	$
7.	Net capital gain used in computing line 1	$	$	$	$
8.	Net gain from sale or exchange of property other than capital assets used in computing line 1 (for taxable years beginning after December 31, 1937)				
9.	Net gain from involuntary conversion of property used in computing line 1				
10.	Total of lines 7 to 9	$	$	$	$
11.	Difference between lines 6 and 10	$	$	$	$
12.	Net gain from sale or exchange of capital assets after considering net capital loss carry-over				
13.	Net gain from sale, exchange, or involuntary conversion of property other than capital assets				
14.	Total of lines 11 to 13	$	$	$	$
15.	Net loss from sale, exchange, or involuntary conversion of property other than capital assets	$	$	$	$
16.	Stock and securities of affiliated corporations which became worthless during the taxable year (if included in line 2, 3, or 7)				
17.	Total of lines 15 and 16	$	$	$	$
18.	Normal-tax (or special-class) net income after applying section 711 (b) (2) (line 14 minus line 17)	$	$	$	$
19.	Net short-term capital gain after considering net capital loss carry-over (do not enter net short-term capital loss)				
20.	Dividends received credit				
21.	Deductions on account of retirement or discharge of bonds, etc.				
22.	Casualty, demolition, and similar losses not taken into account in computing line 12, 13, or 15				
23.	Repayment of processing tax to vendee				
24.	(a) Abnormal judgment liabilities, etc. (attach statement)				
	(b) Abnormal expenditures for intangible drilling and development costs (attach statement)				
	(c) Other abnormal deductions (attach statement)				
25.	Capitalization of expenditures for advertising or promotion of goodwill (attach statement)				
26.	Total of lines 18 to 25	$	$	$	$
27.	Income from retirement or discharge of bonds, etc.	$	$	$	$
28.	Dividends received from domestic corporations				
29.	Net gain from sale or exchange of capital assets after considering net capital loss carry-over (line 12, above)				
30.	Total of lines 27 to 29	$	$	$	$
31.	Excess profits net income (line 26 minus line 30)	$	$	$	$
32.	Net aggregate of columns 1, 2, 3, and 4				$
33.	Increase in lowest year in base period (attach statement)				
34.	Total of lines 32 and 33				$
35.	Average base period net income—General average (line 34 divided by number of months in base period, multiplied by 12)				$

(Fill in lines 36 to 42 for computation of average base period net income where there are increased earnings in last half of base period)

36.	Net aggregate of columns 3 and 4, line 31 (see instruction regarding limitation applicable to taxable year ending after May 31, 1940)	$
37.	Net aggregate of columns 1 and 2, line 31	
38.	Excess of line 36 over line 37	$
39.	One-half of line 38	
40.	Line 36 plus line 39	$
41.	Line 40 divided by number of months in second half of base period, multiplied by 12	$
42.	Average base period net income—Increased earnings in last half of base period (line 41, or the highest excess profits net income for any taxable year in the base period, whichever is lesser)	$
43.	95 percent of line 35 or line 42, whichever is greater	$
44.	Net capital addition, $_____; or net capital deduction, $_____ (attach statement).	
45.	8 percent of line 44, if a net capital addition (or 6 percent of line 44, if a net capital reduction)	
46.	Excess profits credit—based on income (line 43 plus line 45, if a net capital addition) (or line 43 minus line 45, if a net capital reduction)	$

[fol. 200] Schedule C—Excess Profits Credit—
Based on Invested Capital.

(Here follows 1 Photolithograph, side folio 200-201)

Page 6

Schedule C.—EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL

Line No.			
	Equity Invested Capital at the Beginning of the Taxable Year (See Instructions for Schedule C, Items 1 to 12, inclusive)		
1.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital		$ 320,000.00
2.	Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
3.	Distributions of earnings and profits in stock of the corporation		
4.	(a) Accumulated earnings and profits	$ 326,834.76	
	(b) Adjustment for transferor's deficit under section 718 (c) (3)	$	
	(c) Increase or decrease under section 761 (d) (1) on account of intercorporate liquidation	$	
	(d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c)		326,834.76
5.	25 percent of new capital paid in during a taxable year beginning after December 31, 1940		40,500.00
6.	Increase on account of intercorporate liquidation under section 761 (d) (2)		
7.	Deficit in earnings and profits of another corporation under section 718 (a) (7)		
8.	Total of lines 1 to 7		$ 686,334.76
9.	Less: Distributions made prior to the taxable year not out of accumulated earnings and profits	$	
10.	Earnings and profits of another corporation required to be deducted by section 718 (b) (3)		
11.	Decrease on account of intercorporate liquidation under section 761 (d) (2)		
12.	Deficit in earnings and profits in invested capital of another corporation (section 718 (b) (5))		
13.	Total of lines 9 to 12		
14.	Equity invested capital at beginning of taxable year (line 8 minus line 13)		$ 686,334.76
	Average Additions to Equity Invested Capital During the Taxable Year (See Instructions for Schedule C, Items 1 to 12, inclusive)		
15.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital	$	
16.	Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
17.	Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of a corporation (see line 24, below)		
18.	25 percent of new capital		
19.	Increase on account of intercorporate liquidation under section 761 (d) (2)		
20.	Deficit in earnings and profits of another corporation under section 718 (a) (7)		
21.	Total additions in lines 15 to 20		
22.	Total of lines 14 and 21		$ 686,334.76
	Average Reduction in Equity Invested Capital During the Taxable Year (See Instructions for Schedule C, Items 1 to 12, inclusive)		
23.	Distributions not out of earnings and profits of the taxable year	$	
24.	Stock distributions from accumulated earnings and profits at beginning of year (see line 17, above)		
25.	Decrease on account of intercorporate liquidation under section 761 (d) (2)		
26.	Deficit in earnings and profits included in invested capital of another corporation (section 718 (b) (5))		
27.	Total reductions in lines 23 to 26		
	(See Instructions for Schedule C, Items 28 to 41, inclusive)		
28.	Average equity invested capital (line 22 minus line 27)		$ 686,334.76
29.	Average borrowed capital (attach schedule)	$ 677,078.20	
30.	Average borrowed invested capital (50 percent of line 29)		338,539.14
31.	Average invested capital (line 28 plus line 30)		$ 937,873.90
32.	Total inadmissible assets	$	
33.	Total admissible and inadmissible assets	$	
34.	Percentage which line 32 is of line 33		%
35.	Reduction on account of inadmissible assets (..... percent of line 31)		
36.	Invested capital (line 31 minus line 35)		$ 937,873.90
37.	Portion of line 36 (not in excess of $5,000,000); and credit at 8 percent	$ 937,873.90	8% $ 75,029.91
38.	Portion of line 36 (over $5,000,000, but not over $10,000,000); and credit at 7 percent		7%
39.	Portion of line 36 (over $10,000,000, but not over $200,000,000); and credit at 6 percent		6%
40.	Portion of line 36 (over $200,000,000); and credit at 5 percent		5%
41.	Excess profits credit—based on invested capital (total of lines 37 to 40)		$ 75,029.91

5. 25 percent of new capital paid in during a taxable year beginning after December 31, 1940 — 40,500.00
6. Increase on account of intercorporate liquidation under section 761 (d) (2)
7. Deficit in earnings and profits of another corporation under section 718 (a) (7)
8. Total of lines 1 to 7 — $ 686,334.76
9. Less: Distributions made prior to the taxable year not out of accumulated earnings and profits
10. Earnings and profits of another corporation required to be deducted by section 718 (b) (3)
11. Decrease on account of intercorporate liquidation under section 761 (d) (2)
12. Deficit in earnings and profits in invested capital of another corporation (section 718 (b) (5))
13. Total of lines 9 to 12
14. Equity invested capital at beginning of taxable year (line 8 minus line 13) — $ 686,334.76
15. Money paid in for stock, or as paid-in surplus, or as a contribution to capital
16. Property paid in for stock, or as paid-in surplus, or as a contribution to capital
17. Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation (see line 24, below)
18. 25 percent of new capital
19. Increase on account of intercorporate liquidation under section 761 (d) (2)
20. Deficit in earnings and profits of another corporation under section 718 (a) (7)
21. Total additions in lines 15 to 20
22. Total of lines 14 and 21 — $ 686,334.76
23. Distributions not out of earnings and profits of the taxable year
24. Stock distributions from accumulated earnings and profits at beginning of year (see line 17, above)
25. Decrease on account of intercorporate liquidation under section 761 (d) (2)
26. Deficit in earnings and profits included in invested capital of another corporation (section 718 (b) (5))
27. Total reductions in lines 23 to 26
28. Average equity invested capital (line 22 minus line 27) — $ 686,334.76
29. Average borrowed capital (attach schedule) — $ 677,078.20
30. Average borrowed invested capital (50 percent of line 29) — 338,539.14
31. Average invested capital (line 28 plus line 30) — $ 937,873.90
32. Total inadmissible assets
33. Total admissible and inadmissible assets
34. Percentage which line 32 is of line 33 — %
35. Reduction on account of inadmissible assets (..... percent of line 31)
36. Invested capital (line 31 minus line 35) — $ 937,873.90
37. Portion of line 36 (not in excess of $5,000,000); and credit at 8 percent — $ 937,873.90 — 8% — $ 75,029.91
38. Portion of line 36 (over $5,000,000, but not over $10,000,000); and credit at 7 percent — 7%
39. Portion of line 36 (over $10,000,000, but not over $200,000,000); and credit at 6 percent — 6%
40. Portion of line 36 (over $200,000,000); and credit at 5 percent — 5%
41. Excess profits credit—based on invested capital (total of lines 37 to 40) — $ 75,029.91

[fol. 202] BEFORE THE TAX COURT OF THE UNITED STATES

PETITIONER'S EXHIBIT 21.

Amended United States Corporation Excess Profits Tax Return for Fiscal Year Ending September 30, 1944.

[fol. 204]

Lewyt Corporation

431 East 52nd Street, New York 22, N. Y.

Form 1121 Page 4 Line 29—Average Borrowed Capital

	Days		
Oct. 1, 1943 to June 30, 1944	274	$621,750.42	$170,359,615.08
July 1, 1944 to Sept. 11, 1944	43	821,750.42	59,987,780.66
Sept. 12, 1944 to Sept. 29, 1944	18	921,750.42	16,591,507.56
Sept. 30, 1944	1	871,750.42	871,750.42
Totals	366		$247,810,653.72
Average Borrowed Capital			$677,078.29

Amended Return

Lewyt Corporation

431 East 52nd Street, New York, N. Y.

Fiscal Year Ended September 30, 1944

Tentative Tax Computed Under Revenue Act of 1943

Excess Profits Tax

Excess Profits Net Income (Item 1—Form 1121 Attached)		$757,408.69
Less—Specific Exemption	$10,000.00	
Excess Profits Credit	76,629.91	86,629.91
Adjusted Excess Profits Net Income		$670,778.78
95% Tax		$637,239.84
Net Income Before Deducting Income Subject to Excess Profits Tax		$747,236.60
80% Tax		$597,789.28
Less Normal & Surtax		30,583.13
Excess Profits Tax—Tentative		$567,206.15

[fol. 205]

Normal Tax & Surtax		
Net Income	$747,236.60	
Less Income Subject to Excess Profits Tax	670,778.78	
Normal Tax & Surtax Net Income		$ 76,457.82
Normal Tax 24%	$ 18,349.88	
Surtax 16%	12,233.25	
Total Normal Tax & Surtax—Tentative		$ 30,583.13
Recapitulation		
Normal Tax & Surtax:		
92/365 of Tentative Tax under 1942 Act $28,583.13	$ 7,204.51	
273/365 of Tentative Tax under 1943 Act $30,583.13	22,874.50	
Total Normal Tax & Surtax		$ 30,079.01
Excess Profits Tax:		
92/365 of Tentative Tax under 1942 Act $569,206.15	$143,471.14	
273/365 of Tentative Tax under 1942 Act $567,206.15	424,239.12	
Total Excess Profits Tax	$567,710.26	
Less Credit of Debt Retirement (40% of $50,000)	20,000.00	
Net Excess Profits Tax		$547,710.26
Post War Refund:		
10% of Excess Profits Tax of $567,710.26	$ 56,771.03	
Less Credit for Debt Retirement	20,000.00	
Post War Refund		$ 36,771.03

[fol. 206] Schedule B—Excess Profits Credit—Based on Income.

(Here follows 1 Photolithograph, side folio 207)

(Here follow 2 Photolithographs, side folios 203, 203a)

Form 1121
Treasury Department
Internal Revenue Service

AMENDED RETURN

UNITED STATES
CORPORATION EXCESS PROFITS TAX RETURN
For Calendar Year 1943

8 52 1943

or fiscal year beginning Oct. 1, 1943, and ending Sept. 30, 1944

File Code
Serial No. 11 406903
District 3

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

LEVYT CORPORATION

431 East 52nd Street

New York 22 N. Y.

Business group serial number entered on page 1, Form 1120

Cash Check M. O.
First payment
$

THE TAX COURT OF THE U.S.
DIV. 1 DOCKET 2515
ADMITTED IN EVIDENCE
OCT 30 1951
PETITIONER'S EXHIBIT 21
RESPONDENT'S

THE TAX COURT OF THE U.S.
DIV. DOCKET
ADMITTED IN EVIDENCE
OCT 30 1951
PETITIONER'S EXHIBIT 14
RESPONDENT'S

RECEIVED
No. 53
SEP 14 1945
COLLECTOR OF INTERNAL REVENUE
THIRD DIST. N.Y.

EXCESS PROFITS TAX COMPUTATION

	Column 1 Income Credit Method	Column 2 Invested Capital Credit Method
1. Excess profits net income (from line 7, Schedule A)		$ 757,408.69
2. Specific exemption	$ 5,000	$ 5,000
3. Excess profits credit—based on income (from line 6, Schedule B)	XXXXXXX	76,629.91
4. Excess profits credit—based on invested capital (line 41, Schedule C)	XXXXXXX	$ 81,629.91
5. Unused excess profits credit adjustment (attach schedule)	$	$ 675,778.78
6. Total of items 3 to 5	$	$ 675,778.78
7. Difference between items 1 and 6 (enter item 7, column 2, when applicable)		$ 608,200.90
8. Adjusted excess profits net income		$ 747,236.60
9. 90 percent of item 8		
10. Net income (computed without regard to the credit provided by section 26 (e)) (item 35, page 1, Form 1120)		$ 747,236.60
11. Less: (a) Dividends received credit (85 percent of total of column 2, Schedule E, Form 1120 (excluding dividends received on certain preferred stock of a public utility), but not in excess of 85 percent of item 10 above)	$	
(b) Dividends paid on certain preferred stocks if taxpayer is a public utility (line 20, page 2, Form 1120)		
12. Surtax net income (computed without regard to the credit provided by section 26 (e))		$ 747,236.60
13. 80 percent of item 12		597,789.28
14. Income tax under Chapter 1 (other than section 102) for the taxable year (item 41, page 1, Form 1120)		28,583.13
15. Excess of item 13 over item 14		$ 569,206.15
16. Item 9, or item 15, whichever is lesser		$ 569,206.15
17. Amount deferred by reason of the application of section 710 (a) (5) (relating to abnormality under section 722) (attach schedule)		$
18. Excess profits tax:		
(a) Item 16 minus item 17	$ 569,209.15	
(b) If schedule is filed under question (g), page 2, amount of tax as computed in such schedule		
(c) Item 18 (a) or item 18 (b), whichever is applicable		$ 569,206.15
19. Less: Credit for income taxes paid to a foreign country or United States possession allowed to a domestic corporation (portion not used in computing item 42, page 1, Form 1120)	Amd Tax 549,206.15	
20. Item 18 (c) minus item 19	Orig Tax 605 561.59	$ 569,206.15
Less: Credit for debt retirement (item 28, below)	Tax due none	20,000.00
21. 20 minus item 21		$ 549,206.15
23. Adjustment, if any, due to application of section 734 (adjustment in case of position inconsistent with prior income tax liability) (attach schedule)		
24. Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)		$ 549,206.15

POST-WAR REFUND OF EXCESS PROFITS TAX AND CREDIT FOR DEBT RETIREMENT

25. Balance excess profits tax (item 18 (c), above)		$ 569,206.15
26. Credit allowable under sections 780 and 781 (10 percent of item 25) (but in cases where item 19 is applicable, see Specific Instructions 25-26)		$ 56,920.62
27. Less: amounts paid on indebtedness or net reduction in indebtedness under section 783 (b) (2)	$ 50,000.00	
28. Credit for debt retirement allowable under section 783 (40 percent of item 27, but not in excess of 10 percent of item 25)		20,000.00
29. Net post-war refund credit (item 26 minus item 28)		$ 36,920.62

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 14 day of September, 1945.

Notary Public, N.Y. Co.
Cert. Filed in [illegible]
Commission Expires March 30, 1946

NOTARIAL SEAL

Helga Dewey
(Signature of officer administering oath)

(Title)

CORPORATE SEAL

(President or other principal officer) (state title)

(Treasurer, Assistant Treasurer, or Chief Accounting Officer) (state title)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that this return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 14 day of September, 1945.

(Signature of person preparing the return)

NOTARIAL SEAL

Helga Dewey
(Signature of officer administering oath)

Notary Public, N.Y. Co. No. 42
Cert. Filed in [illegible] Co. No. 42
Commission Expires March 30, 1946
(Title)

(Address of person preparing the return)

Leon T. Brown
(Name of firm or employer, if any)

Page 2

QUESTIONS

(a) Date of incorporation December, 1942 (b) State or country New York

(c) Collector's office in which your income tax return for the taxable year was filed 3rd New York

(d) Is this a consolidated return? No If so, procure from the collector Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of the consolidated income tax return.

(e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, reduced by the amount of amortizable bond premium under section 125 attributable to, all Government obligations described in section 22(b)(4) of the Internal Revenue Code? (Answer "yes" or "no") Yes

(f) Are you a transferor or transferee upon an exchange as defined by section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") No

(g) Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (1) below? (Answer "yes" or "no") No If answer is "yes":

(1) Check the appropriate sections and submit schedules showing computation: 710(a)(4) ☐; 721 ☐; 726 ☐; 731 ☐; 735(b) ☐; 735(c) ☐; 736(a) ☐; 736(b) ☐. (See General Instructions E, F, G, H, and I.) (Enter amount of excess profits tax as item 18 (b), page 1.)

(2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following sections: 721, $ ....; 726, $ ....; 731, $ ....

(3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following sections: 721, $ ....; 731, $ ....; 735(b), $ ....; 735(c), $ ....

(h) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), $ 2,806,034.14

Schedule A. EXCESS PROFITS NET INCOME COMPUTATION

Line No.		Column 1 Income Credit Method	Column 2 Invested Capital Credit Method
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 37, page 1, Form 1120)	$	$ 747,236.60
2.	Net short-term capital gain (do not enter net short-term capital loss)		
3.	Adjustment to net operating loss deduction		
4.	Decrease in deductions limited by income		
5.	80 percent of interest on borrowed capital	XXXXXXX XX	10,172.09
6.	Interest on Government obligations (see question (e) above, for election)	XXXXXXX XX	
7.	Total of lines 1 to 6	$	$ 757,408.69
8.	Net gain from sale or exchange of capital assets (item 12 (a), page 1, Form 1120)	$	$
9.	Income from retirement or discharge of bonds, etc.		
10.	Refunds and interest on Agricultural Adjustment Act taxes		
11.	Recoveries of bad debts		
12.	Increase in deductions limited by income		
13.	(a) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)		XXXXXXX XX
	(b) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)	XXXXXXX XX	
14.	Nontaxable income of certain industries with depletable resources		
15.	Total of lines 8 to 14	$	$ none
16.	Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15)	$	$ 757,408.69
17.	Deductions applicable to life insurance companies		
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$	$ 757,408.69

(f) Are you a transferor or transferee upon an exchange as defined by section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") No

(g) Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (1) below? (Answer "yes" or "no") No If answer is "yes":

(1) Check the appropriate sections and submit schedules showing computation: 710(a)(4) ☐; 721 ☐; 726 ☐; 731 ☐; 735(b) ☐; 735(c) ☐; 736(a) ☐; 736(b) ☐. (See General Instructions E, F, G, H, and I.) (Enter amount of excess profits tax as item 18 (b), page 1.)

(2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following sections: 721, $ ....; 726, $ ....; 731, $ ....

(3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following sections: 721, $ ....; 731, $ ....; 735(b), $ ....; 735(c), $ ....

(h) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), $ 2,806,034.14

Schedule A. EXCESS PROFITS NET INCOME COMPUTATION

Line No.		Column 1 Income Credit Method	Column 2 Invested Capital Credit Method
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 37, page 1, Form 1120)	$	$ 747,236.60
2.	Net short-term capital gain (do not enter net short-term capital loss)		
3.	Adjustment to net operating loss deduction		
4.	Decrease in deductions limited by income		
5.	80 percent of interest on borrowed capital	XXXXXXX XX	10,172.09
6.	Interest on Government obligations (see question (e) above, for election)	XXXXXXX XX	
7.	Total of lines 1 to 6	$	$ 757,408.69
8.	Net gain from sale or exchange of capital assets (item 12 (a), page 1, Form 1120)	$	$
9.	Income from retirement or discharge of bonds, etc.		
10.	Refunds and interest on Agricultural Adjustment Act taxes		
11.	Recoveries of bad debts		
12.	Increase in deductions limited by income		
13.	(a) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)		XXXXXXX XX
	(b) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)	XXXXXXX XX	
14.	Nontaxable income of certain industries with depletable resources		
15.	Total of lines 8 to 14	$	$ none
16.	Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15)	$	$ 757,408.69
17.	Deductions applicable to life insurance companies		
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$	$ 757,408.69

Schedule B.—EXCESS PROFITS CREDIT—BASED ON INCOME

TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1939, AND BEFORE JANUARY 1, 1940
(If additional columns are required, attach separate schedule)

Line No.		1. Year Ended ..., 19..	2. Year Ended ..., 19..	3. Year Ended ..., 19..	4. Year Ended ..., 19..
1.	Normal-tax (or special-class) net income	$	$	$	$
2.	Net capital loss used in computing line 1				
3.	Securities which are capital assets deducted in computing line 1 as bad debts or as stock determined to be worthless (for taxable years beginning prior to January 1, 1938)				
4.	Net loss from sale or exchange of property other than capital assets deducted in computing line 1 (for taxable years beginning after December 31, 1937)				
5.	Net loss from involuntary conversion of property deducted in computing line 1				
6.	Total of lines 1 to 5	$	$	$	$
7.	Net capital gain used in computing line 1	$	$	$	$
8.	Net gain from sale or exchange of property other than capital assets used in computing line 1 (for taxable years beginning after December 31, 1937)				
9.	Net gain from involuntary conversion of property used in computing line 1				
10.	Total of lines 7 to 9	$	$	$	$
11.	Difference between lines 6 and 10	$	$	$	$
12.	Net gain from sale or exchange of capital assets after considering net capital loss carry-over				
13.	Net gain from sale, exchange, or involuntary conversion of property other than capital assets				
14.	Total of lines 11 to 13	$	$	$	$
15.	Net loss from sale, exchange, or involuntary conversion of property other than capital assets	$	$	$	$
16.	Stock and securities of affiliated corporations which became worthless during the taxable year (if included in line 2, 3, or 7)				
17.	Total of lines 15 and 16	$	$	$	$
18.	Normal-tax (or special-class) net income after applying section 711 (b) (2) (line 14 minus line 17)	$	$	$	$
19.	Net short-term capital gain after considering net capital loss carry-over (do not enter net short-term capital loss)				
20.	Dividends received credit				
21.	Deductions on account of retirement or discharge of bonds, etc.				
22.	Casualty, demolition, and similar losses not taken into account in computing line 12, 13, or 15				
23.	Repayment of processing tax to vendee				
24.	(a) Abnormal judgment liabilities, etc. (attach statement)				
	(b) Abnormal expenditures for intangible drilling and development costs (attach statement)				
	(c) Other abnormal deductions (attach statement)				
25.	Capitalization of expenditures for advertising or promotion of goodwill (attach statement)				
26.	Total of lines 18 to 25	$	$	$	$
27.	Income from retirement or discharge of bonds, etc.	$	$	$	$
28.	Dividends received from domestic corporations				
29.	Net gain from sale or exchange of capital assets after considering net capital loss carry-over (line 12, above)				
	Total of lines 27 to 29	$	$	$	$
31.	Excess profits net income (line 26 minus line 30)	$	$	$	$
32.	Net aggregate of columns 1, 2, 3, and 4				$
33.	Increase in lowest year in base period (attach statement)				
34.	Total of lines 32 and 33				$
35.	Average base period net income—General average (line 34 divided by number of months in base period, multiplied by 12)				$

(Fill in lines 36 to 42 for computation of average base period net income where there are increased earnings in last half of base period)

36.	Net aggregate of columns 3 and 4, line 31 (see instruction regarding limitation applicable to taxable year ending after May 31, 1940)	$	
37.	Net aggregate of columns 1 and 2, line 31		
38.	Excess of line 36 over line 37	$	
39.	One-half of line 38		
40.	Line 36 plus line 39	$	
41.	Line 40 divided by number of months in second half of base period, multiplied by 12	$	
42.	Average base period net income—Increased earnings in last half of base period (line 41, or the highest excess profits net income for any taxable year in the base period, whichever is lesser)		$
43.	95 percent of line 35 or line 42, whichever is greater		$
44.	Net capital addition, $...; or net capital deduction, $... (attach statement).		
45.	8 percent of line 44, if a net capital addition (or 6 percent of line 44, if a net capital reduction)		
46.	Excess profits credit—based on income (line 43 plus line 45, if a net capital addition) (or line 43 minus line 45, if a net capital reduction)		$

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Form 1121
Treasury Department
Internal Revenue Service

Page 1

UNITED STATES
CORPORATION EXCESS PROFITS TAX RETURN
For Calendar Year 1944

1944

or fiscal year beginning Oct. 1, 1944, and ending Sept. 30, 1945

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

LENXT CORPORATION (Name) MAY 1946

431 East 52nd Street (Street and number)

New York (City or town, postal zone number) New York (State)

Business group serial number entered on page 1, Form 1120

File Code
Serial No.
District
(Cashier's stamp)

Cash Check M. O.
First payment
$

THE TAX COURT OF THE U.S.
DIV. 1 DOCKET 8151
ADMITTED IN EVIDENCE
NEW YORK
OCT 30 1951
PETITIONER'S EXHIBIT 25

APR 15 1946
INTERNAL REVENUE
Hibill Dist.

EXCESS PROFITS TAX COMPUTATION

Item and Instruction No.		Column 1 Income Credit Method	Column 2 Invested Capital Credit Method
1.	Excess profits net income (line 18, Schedule A)	2078	$ 1,236,9[illegible]
2.	Specific exemption	$ 10,000	$ 10,000
3.	Excess profits credit—based on income (line 43, Schedule B) Acc. Dist.	x x x x x x x	x x
4.	Excess profits credit—based on invested capital (line 19, Schedule C) Internal Revenue	x x x x x x x	x x 64,421.41
5.	Unused excess profits credit adjustment (attach schedule)		
6.	Total of items 2 to 5	$	$ 74,421.41
7.	Difference between item 1 and item 6	$	$ 2,[illegible]
8.	Adjusted excess profits net income (item 7, column 1, or item 7, column 2, whichever is applicable) OVERASSESSMENT TENTATIVE ALLOWANCE CB		$ 1,162,43[illegible]
9.	95 percent of item 8		$ 1,104,35[illegible]
10.	Net income (item 36, page 1, Form 1120) $612 SUL 13		$ 1,225,641.63
11.	Less: (a) Dividends received credit (85 percent of total of column 2, Schedule E, Form 1120, excluding dividends received on certain preferred stock of a public utility), but not in excess of 85 percent of item 10 OVERASSESSMENT TENTATIVE ALLOWANCE CB $ 875.9		
	(b) Credit for dividends paid on certain preferred stocks if taxpayer is a public utility (20 percent of [illegible] Form 1120)		
12.	Surtax net income (computed without regard to credit provided in section 26 (e) (sum of lines 18 and 21, page 2, Form 1120) and without regard to 80 percent limitation credit provided in section 26 (h))		$ 1,225,641.63
13.	80 percent of item 12		330,513.30
14.	Income tax under Chapter 1 (other than section 102) for the taxable year (item 42, page 1, Form 1120)		23,715.48
15.	Excess of item 13 over item 14		$ 956,797.32
16.	Item 9, or item 15, whichever is lesser		$ 956,797.32
17.	Amount deferred by reason of the application of section 710 (a) (5) (relating to abnormality under section 722) (attach schedule)		$
18.	Excess profits tax: (a) Item 16 minus item 17	$ 956,797.32	
	(b) If schedule is filed under question (g), page 2, amount of tax as computed in such schedule		
	(c) Item 18 (a) or item 18 (b), whichever is applicable		$ 956,797.32
19.	Less: Credit for income taxes paid to a foreign country or United States possession allowed to a domestic corporation (portion not used in computing item 43, page 1, Form 1120)		
20.	Item 18 (c) minus item 19		$ [illegible]
21.	Less: Credit for debt retirement (item 28, below)		[illegible]
22.	Item 20 minus item 21		$
23.	Amount, if any, due to application of section 734 (adjustment in case of position inconsistent with prior income tax liability) (attach schedule)		
24.	Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)		$ [illegible]

POST-WAR REFUND OF EXCESS PROFITS TAX AND CREDIT FOR DEBT RETIREMENT

25.	Balance of excess profits tax (item 18 (c), above)	$
26.	Credit allowable under sections 780 and 781 (10 percent of item 25) (but in cases where item 19 is applicable, see Specific Instructions 25-29)	$
27.	Lesser of amounts paid on indebtedness or net reduction in indebtedness under section 783 (b) (2)	$
28.	Credit for debt retirement allowable under section 783 (40 percent of item 27, but not in excess of 10 percent of item 25)	
29.	Net post-war refund credit (item 26 minus item 28)	$

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 15th day of April, 1946

NOTARIAL SEAL

HENRIETTA S. ROSENBERG
NOTARY PUBLIC, KINGS COUNTY
New York Co. Clk's No. 303, Reg. No. 3927-S-3
Kings Co. Clk's No. 510, Reg. No. 5097-S-3
Certificate filed in New York County
Kings County Term Expires March 30, 1946

(Signature of officer administering oath) (Title)

CORPORATE SEAL

(President or other principal officer) (State title)

(Treasurer, Assistant Treasurer, or Chief Accounting Officer) (State title)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 15th day of April, 1946

NOTARIAL SEAL

HENRIETTA S. ROSENBERG
NOTARY PUBLIC, KINGS COUNTY
New York Co. Clk's No. 303, Reg. No. 3927-S-3
Kings Co. Clk's No. 510, Reg. No. 5097-S-3
Certificate filed in New York County
Kings County Term Expires March 30, 1946

(Signature of officer administering oath) (Title)

(Signature of person preparing the return)

(Signature of person preparing the return)

16—41119-1 (Name of firm or employer, if any)

[fol. 208] Schedule C—Excess Profits Credit—
Based on Invested Capital.

Page 2

QUESTIONS

(a) Date of incorporation December 1942 (b) State or country New York

(c) Collector's office in which your income tax return for the taxable year was filed 3rd New York

(d) Is this a consolidated return? No If so, procure from the collector Form 851, Affiliations Schedule, which shall be filed in, sworn to, and filed as a part of the consolidated income tax return.

(e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, reduced by the amount of amortizable bond premium under section 125 attributable to, all Government obligations described in section 22(b)(4) of the Internal Revenue Code? (Answer "yes" or "no") .....

(f) Are you a transferor or transferee upon an exchange as defined by section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") No

(g) Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (1) below? (Answer "yes" or "no") No If answer is "yes":

(1) Check the appropriate sections and submit schedules showing computation: 710(a)(4) ☐; 721 ☐; 726 ☐; 731 ☐; 735(b) ☐; 735(c) ☐; 736(a) ☐; 736(b) ☐. (See General Instructions E, F, G, H, and I.) (Enter amount of excess profits tax as Item 18 (b), page 1.)

(2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following sections: 721, $ .....; 726, $.....; 731, $.....

(3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following sections: 721, $.....; 731, $.....; 735(b), $.....; 735(c), $.....

(h) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), $2,628,221.07

(i) Has a constructive average base period net income under section 722 been used in computing the excess profits credit used on this return? No If the answer is "yes," was such constructive average base period net income finally determined? ..... Or, if not finally determined, is it used pursuant to permission granted by the Commissioner? ..... If the answer to the first question is "yes," the following questions should be answered and the required information furnished:

(1) Is the amount of the constructive average base period net income so used the same as that which was finally determined or permitted? ..... If the answer is "no," attach statement setting forth reasons for the variance and the amount thereof.

(2) If the constructive average base period net income resulted from the application of section 722 (b) (4) or (5) or section 722 (c), are the facts and circumstances different in the taxable year from the facts and circumstances with respect to which the claim for relief was first allowed? ..... If so, attach statement containing a brief description of the difference and an account of its effect upon the business of the taxpayer for the taxable year.

(3) State the amount of the excess profits credit for the taxable year computed without regard to section 722. $.....

(j) Is any unused excess profits credit adjustment computed with the use of a constructive average base period net income? No If the answer is "yes," attach schedule showing computation.

Schedule A. - EXCESS PROFITS NET INCOME COMPUTATION

Line No.		Column 1 Income Credit Method		Column 2 Invested Capital Credit Method	
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 28, page 1, Form 1120)	$		$ 1,225,641	63
2.	Net short-term capital gain (do not enter net short-term capital loss)				
3.	Adjustment to net operating loss deduction				
4.	Decrease in deductions limited by income				
5.	50 percent of interest on borrowed capital	x x x x x x x	x x	11,262	18
6.	Interest on Government obligations (see question (e) above, for election)	x x x x x x x	x x		
7.	Total of lines 1 to 6	$		$ 1,236,903	81
8.	Net gain from sale or exchange of capital assets (item 12 (a) plus item 28, page 1, Form 1120)	$		$	
9.	Income from retirement or discharge of bonds, etc.				
10.	Refunds and interest on Agricultural Adjustment Act taxes				
11.	Recoveries of bad debts				
12.	Increase in deductions limited by income				
13.	(a) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)			x x x x x x x	x
	(b) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)	x x x x x x x	x x		
14.	Nontaxable income of certain industries with depletable resources				
15.	Total of lines 8 to 14	$		$	
16.	Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15)	$		$ 1,236,903	81
17.	Deductions applicable to life insurance companies				
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$		$ 1,236,903	81

721, $.....; 731, $.....; 735(b), $.....; 735(c), $.....

(h) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), $2,628,221.07

(i) Has a constructive average base period net income under section 722 been used in computing the excess profits credit used on this return? No If the answer is "yes," was such constructive average base period net income finally determined? ..... Or, if not finally determined, is it used pursuant to permission granted by the Commissioner? ..... If the answer to the first question is "yes," the following questions should be answered and the required information furnished:

(1) Is the amount of the constructive average base period net income so used the same as that which was finally determined or permitted? ..... If the answer is "no," attach statement setting forth reasons for the variance and the amount thereof.

(2) If the constructive average base period net income resulted from the application of section 722 (b) (4) or (5) or section 722 (c), are the facts and circumstances different in the taxable year from the facts and circumstances with respect to which the claim for relief was first allowed? ..... If so, attach statement containing a brief description of the difference and an account of its effect upon the business of the taxpayer for the taxable year.

(3) State the amount of the excess profits credit for the taxable year computed without regard to section 722. $.....

(j) Is any unused excess profits credit adjustment computed with the use of a constructive average base period net income? No If the answer is "yes," attach schedule showing computation.

Schedule A. - EXCESS PROFITS NET INCOME COMPUTATION

Line No.		Column 1 Income Credit Method		Column 2 Invested Capital Credit Method	
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 28, page 1, Form 1120)	$		$ 1,225,641	63
2.	Net short-term capital gain (do not enter net short-term capital loss)				
3.	Adjustment to net operating loss deduction				
4.	Decrease in deductions limited by income				
5.	50 percent of interest on borrowed capital	x x x x x x x	x x	11,262	18
6.	Interest on Government obligations (see question (e) above, for election)	x x x x x x x	x x		
7.	Total of lines 1 to 6	$		$ 1,236,903	81
8.	Net gain from sale or exchange of capital assets (item 12 (a) plus item 28, page 1, Form 1120)	$		$	
9.	Income from retirement or discharge of bonds, etc.				
10.	Refunds and interest on Agricultural Adjustment Act taxes				
11.	Recoveries of bad debts				
12.	Increase in deductions limited by income				
13.	(a) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)			x x x x x x x	x
	(b) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)	x x x x x x x	x x		
14.	Nontaxable income of certain industries with depletable resources				
15.	Total of lines 8 to 14	$		$	
16.	Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15)	$		$ 1,236,903	81
17.	Deductions applicable to life insurance companies				
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$		$ 1,236,903	81

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(Here follows 1 Photolithograph, side folios 209-221)

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Schedule C—EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL

Line No.	Equity Invested Capital at the Beginning of the Taxable Year (See instructions for Schedule C, lines 1 to 12, inclusive)		
1.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital		$ 250,000.00
2.	Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
3.	Distributions of earnings and profits in stock of the corporation		
4.	(a) Accumulated earnings and profits	$ 306,834.76	
	(b) Adjustment for transferor's deficit under section 718 (c) (5)	$	
	(c) Increase or decrease under section 761 (d) (1) on account of intercorporate liquidation	$	
	(d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c)		306,834.76
5.	25 percent of new capital paid in during a taxable year beginning after December 31, 1940		62,500.00
6.	Increase on account of intercorporate liquidation under section 761 (d) (2)		
7.	Deficit in earnings and profits of another corporation under section 718 (a) (7)		
8.	Total of lines 1 to 7		$ 619,334.76
9.	Less: Distributions made prior to the taxable year not out of accumulated earnings and profits	$	
10.	Earnings and profits of another corporation required to be deducted by section 718 (b) (3)		
11.	Decrease on account of intercorporate liquidation under section 761 (d) (2)		
12.	Deficit in earnings and profits in invested capital of another corporation (section 718 (b) (5))		
13.	Total of lines 9 to 12		
14.	Equity invested capital at beginning of taxable year (line 8 minus line 13)		$ 619,334.76
	Average Addition to Equity Invested Capital During the Taxable Year (See instructions for Schedule C, lines 1 to 12, inclusive)		
15.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital	$	
16.	Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
17.	Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation (see line 24, below)		
18.	25 percent of new capital		
19.	Increase on account of intercorporate liquidation under section 761 (d) (2)		
20.	Deficit in earnings and profits of another corporation under section 718 (a) (7)		
21.	Total additions in lines 15 to 20		
22.	Total of lines 14 and 21		$ 619,334.76
	Average Reduction in Equity Invested Capital During the Taxable Year (See instructions for Schedule C, lines 1 to 12, inclusive)		
23.	Distributions not out of earnings and profits of the taxable year	$	
24.	Stock distributions from accumulated earnings and profits at beginning of year (see line 17, above)		
25.	Decrease on account of intercorporate liquidation under section 761 (d) (2)		
26.	Deficit in earnings and profits included in invested capital of another corporation (section 718 (b) (5))		
27.	Total reductions in lines 23 to 26		
	(See instructions for Schedule C, lines 28 to 41, inclusive)		
28.	Average equity invested capital (line 22 minus line 27)		$ 619,334.76
29.	Average borrowed capital (attach schedule)	$ 677,078.29	
30.	Average borrowed invested capital (50 percent of line 29)		338,539.14
31.	Average invested capital (line 28 plus line 30)		$ 957,873.90
32.	Total inadmissible assets	$	
33.	Total admissible and inadmissible assets	$	
34.	Percentage which line 32 is of line 33		%
35.	Reduction on account of inadmissible assets (percent of line 31)		
36.	Invested capital (line 31 minus line 35)		$ 957,873.90
37.	Portion of line 36 (not in excess of $5,000,000); and credit at 8 percent	$ 957,873.90	8% $ 76,629.91
38.	Portion of line 36 (over $5,000,000, but not over $10,000,000); and credit at 7 percent		7%
39.	Portion of line 36 (over $10,000,000, but not over $200,000,000); and credit at 6 percent		6%
40.	Portion of line 36 (over $200,000,000); and credit at 5 percent		5%
41.	Excess profits credit—based on invested capital (total of lines 37 to 40)		$ 76,629.91

7. Deficit in earnings and profits of another corporation under section 718 (a) (7)
8. Total of lines 1 to 7 — $ 619,334.76
9. Less: Distributions made prior to the taxable year not out of accumulated earnings and profits — $
10. Earnings and profits of another corporation required to be deducted by section 718 (b) (3)
11. Decrease on account of intercorporate liquidation under section 761 (d) (2)
12. Deficit in earnings and profits in invested capital of another corporation (section 718 (b) (5))
13. Total of lines 9 to 12
14. Equity invested capital at beginning of taxable year (line 8 minus line 13) — $ 619,334.76

Average Addition to Equity Invested Capital During the Taxable Year (See instructions for Schedule C, lines 1 to 12, inclusive)

15. Money paid in for stock, or as paid-in surplus, or as a contribution to capital — $
16. Property paid in for stock, or as paid-in surplus, or as a contribution to capital
17. Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation (see line 24, below)
18. 25 percent of new capital
19. Increase on account of intercorporate liquidation under section 761 (d) (2)
20. Deficit in earnings and profits of another corporation under section 718 (a) (7)
21. Total additions in lines 15 to 20
22. Total of lines 14 and 21 — $ 619,334.76

Average Reduction in Equity Invested Capital During the Taxable Year (See instructions for Schedule C, lines 1 to 12, inclusive)

23. Distributions not out of earnings and profits of the taxable year — $
24. Stock distributions from accumulated earnings and profits at beginning of year (see line 17, above)
25. Decrease on account of intercorporate liquidation under section 761 (d) (2)
26. Deficit in earnings and profits included in invested capital of another corporation (section 718 (b) (5))
27. Total reductions in lines 23 to 26

209=221

[fol. 222] BEFORE THE TAX COURT OF THE UNITED STATES

PETITIONER'S EXHIBIT 25, ADMITTED IN EVIDENCE.

United States Corporation Excess Profits Tax Return
for Fiscal Year Ending September 30, 1945.

[fol. 244] UNITED STATES COURT OF APPEALS
For the Second Circuit, October Term, 1953.

No. 184

Docket No. 22871

LEWYT CORPORATION (Now known as Lewyt Manufacturing Corporation),

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPINION—Argued April 15, 1954—Decided July 14, 1954

Before Clark, Hincks and Harlan, Circuit Judges

Petition to review a decision of the Tax Court determining a deficiency in petitioner's income taxes for the taxable year ended September 30, 1944, and a deficiency in excess profits taxes for the taxable year ended September 30, 1945. Tietjens, *Judge*.

Affirmed.

Freidin & Littauer, New York City (Eugene Meacham, Fred R. Tansill and Seymour Sheriff, of Counsel) for the petitioner.

[fol. 245] H. Brian Holland, Assistant Attorney General (Ellis N. Slack, Lee A. Jackson, and I. Henry Kutz, Special Assistants to the Attorney General, of Counsel) for the respondent.

HARLAN, *Circuit Judge:*

We are asked to review a decision of the Tax Court determining a deficiency of $7,129.21 in petitioner's income tax for the taxable year ended September 30, 1944, and a deficiency of $466,557.19 in excess profits tax for the taxable year ended September 30, 1945. The taxpayer is a New York corporation engaged in the manufacture of vacuum cleaners and electronic devices. For tax purposes it used a fiscal year ending each September 30 and reported on an accrual basis. Each fiscal year referred to

in this opinion will be designated simply by the calendar year in which it ended.

In the two years in question § 23(s) of the Internal Revenue Code [26 U.S.C.A. § 23(s)] provided that in computing net income there should be allowed as a deduction (from gross income) the "net operating loss deduction" provided in § 122 (26 U.S.C.A. § 122). Section 122(a) defines "net operating loss" as "the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d)." We are not concerned here with any of the provisions of subsection (d) except that contained in (d)(6) which permits the deduction of taxes "imposed by Subchapter E of Chapter 2 [excess profits taxes] paid or accrued within the taxable year," subject to certain rules not presently relevant. If a taxpayer has a net operating loss for a given taxable year, § 122(b)(1) and [fol. 246] (2) and § 122(c)[1] provide that it may be ap-

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[1] "§ 122. Net operating loss deduction

* * *

(b) Amount of carry-back and carry-over.

(1) Net operating loss carry-back. If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) Net operating loss carry-over. If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding

(Here follow 2 Photolithographs, side folios 222, 223-243)

plied, in accordance with prescribed specifications, as a deduction in computing net income for the two preceding taxable years (called a "carry-back") and for the two [fol. 247] succeeding taxable years (called a "carry-over"), the starting point being with the second preceding taxable year, and any excess being carried successively, until exhausted, into the subsequent years ending with the taxable year secondly succeeding the year in which the net operating loss occurred.

The taxpayer had net operating losses in each of the years 1946 and 1947, and the dispute we have before us

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taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

(c) Amount of net operating loss deduction. The amount of the net operating loss deduction shall be the aggregate of the net operating less carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income computed without such deduction and without the credit provided in section 26(e)) * * * "

relates primarily to (a) the proper computation of such losses for each of those years, and (b) the application of such losses to the years 1944 and 1945, in each of which the taxpayer had substantial taxable net income.

We come first to the questions relating to the year 1945 in respect of which the Tax Court sustained the determination of the Commissioner that there was a deficiency in excess profits taxes of more than $460,000.

The Commissioner determined that in 1947 the taxpayer had a net operating loss of $786,383.25, which he allowed as a "carry-back" deduction to 1945. The taxpayer claimed additional "carry-backs" to 1945 aggregating $1,381,402.33 by reason of (a) the remittance to the Collector in 1947 of $300,008.87 in respect of excess profits taxes for the years 1943, 1944 and 1945 which, it is asserted, should have been added to the net operating loss for 1947; (b) the remittance to the Collector in 1947 of $55,949.04 interest on the foregoing amount and on some $12,000 of additional income taxes for 1943, which, it is claimed, should also have been added to the 1947 net operating loss; and (c) the failure to allow any portion of the net operating loss for 1946, claimed to be $1,025,444.12, as a "carry-back" to 1945. Each of these claims was denied by the Commissioner, who was sustained by the Tax Court. The taxpayer also contends that the Tax Court erred in failing to credit on the asserted excess profits tax deficiency for 1945 the sum of $108,437.36, which the taxpayer re-[fol. 248] mitted to the Commissioner in 1947 in respect of 1945 excess profits taxes (this amount being part of the $300,008.87 referred to above).

1. *1947 Principal Remittances*

These remittances aggregating $300,008.87 were made under the following circumstances:

Prior to 1947, a dispute arose between the taxpayer and the Collector as to the taxpayer's 1943 tax liability. On August 30, 1946, the Collector issued a statutory notice asserting income and excess profits tax deficiencies for 1943 in the amount of $7,757.49 and $194,992.51, respectively. The taxpayer objected to these deficiencies and took the matter to the Tax Court. Meanwhile, settlement

negotiations were opened. On September 19, 1947, the taxpayer's auditor, believing that a formula for settlement had been reached, recomputed the tax liability for 1943 and sent the Collector a check for $190,002.16, of which $154,473.30 represented additional taxes for 1943 computed in accordance with the supposed settlement formula, and $35,528.86 the interest on such sum from December 15, 1943. The Collector deposited this check on September 29, 1947 in his "Suspense Account."

Notwithstanding this transaction, settlement conferences continued down to October 30, 1947, when they were broken off, the Head of the Technical Staff of the New York Division advising the Division Counsel on November 6, 1947 that a satisfactory settlement had not been reached and that defense of the case should proceed. However, negotiations were evidently resumed, for on February 24, 1948 a settlement stipulation was filed settling, among other things, the asserted 1943 excess profits tax deficiency for the sum of $140,147.87, which was $1,470.26 less than the amount attributable to excess profits taxes ($141,618.13) in the taxpayer's remittance of September 29, 1947.

[fol. 249] On September 29, 1947, the taxpayer also forwarded to the Collector a check for $178,810.92 stated in the letter of transmittal to represent additional taxes of $49,953.38 for 1944, with interest in the amount of $8,492.07, and of $108,437.36 for 1945, with interest in the amount of $11,928.11. This remittance was predicated on a Revenue Agent's examination of the taxpayer's books for 1944 and 1945 (as well as 1946 and 1947), and a computation by the taxpayer's auditor applying in respect of excess profits taxes the same supposed settlement formula as underlay the taxpayer's remittance relating to 1943 excess profits taxes. Although no deficiency notice had been issued, and no settlement negotiations had been begun as to 1944 and 1945 taxes, the factors giving rise to the alleged excess profits tax deficiency for 1943 were deemed equally applicable to 1944 and 1945. The Collector also deposited this second remittance in his "Suspense Account."

The taxpayer charged on its books to earned surplus the principal amounts of these two remittances as tax payments, *viz:* $154,473.30 for 1943, $49,953.38 for 1944, and

$108,437.36 for 1945. Of the first item, $12,855.17 represented income taxes (with which we are not concerned here) and the balance, aggregating $300,008.87, represented excess profits taxes. The interest payments on these three items were charged to 1947 expense on the taxpayer's books, *viz:* $35,528.86 (1943), $8,492.07 (1944) and $11,928.11 (1945), or a total of $55,949.04.

The taxpayer's position that the $300,008.87 of remittances in respect of excess profits taxes should have been allowed as a deduction in computing the net operating loss for 1947 (thereby increasing the "carry-back" to 1945) rests upon §122(d)(6). As heretofore noted, this section gives a deduction for "the amount" of excess profits taxes "imposed" which were "paid or accrued within the taxable year."

[fol. 250] Preliminarily it should be said that while there is an issue relating to the computation of the 1946 net operating loss (which we discuss later) as to the correctness of the Tax Court's holding that in the case of an accrual taxpayer, as this taxpayer was, this section permits only the deduction of excess profits taxes which *accrued* within the taxable year, for the point now under discussion the taxpayer accepts the decision of the Tax Court in this respect as being correct. It can afford to do so since it is clear that none of these excess profits taxes had accrued prior to 1947 because they were in dispute—see *Dixie Pine Products Co.* v. *Comm'r*, 320 U. S. 516 (1944)—and whether they accrued in 1947 depends upon whether they can be considered as "paid" in that year despite the fact that the dispute over them was not settled until at least 1948. See *Chestnut Securities Co.* v. *United States*, 62 F. Supp. 574 (Ct. Cls. 1945), and *Lehigh Valley Railroad* v. *Comm'r*, 12 T. C. 977 (1949). So the sole question with which we are now concerned is whether these 1947 remittances constituted taxes "paid" within the taxable year, that is 1947, within the meaning of §122(d)(6). We think they did not.

A remittance made in respect of an asserted or putative tax liability in no proper sense constitutes a tax "payment" except to the extent that it is effective to discharge such liability in whole or in part. That in turn depends upon the agreement of the taxpayer and the Commissioner or his representatives, acting within their powers, or upon

whether the taxing authorities have a duty under the particular circumstances involved to accept the remittance as a payment of the tax in full or *pro tanto*.

Here there was admittedly no agreement in this respect between the taxpayer and the taxing authorities in 1947, and the only question is whether the Collector was, in the setting of these remittances, under a duty to accept them as "payments" *pro tanto* of the asserted or putative tax [fol. 251] liabilities against Lewyt. We think he had no such duty. The taxpayer's 1943 tax liability was still in dispute on September 29, 1947, when these remittances were made. Settlement negotiations continued into 1948, and no settlement was reached until February 1948. Meanwhile the taxpayer's proceedings in the Tax Court remained alive. With respect to 1944 and 1945 taxes, the Revenue Agent had commenced his examination of the taxpayer's 1944 and 1945 returns, and it was clear that the same issues giving rise to the Commissioner's deficiency notice of August 30, 1946 as regards 1943 taxes were also involved for 1944 and 1945. So far as the record discloses, deficiency notices for 1944 and 1945 were not issued until February 16, 1950; and, in any event, it is clear that the controversy as to those issues present in the 1943 dispute, which were also applicable to 1944 and 1945, was active until at least 1948.

In these circumstances, we think that the action of the Collector in placing these 1947 remittances in his "Suspense Account" to abide the event of the disposition of these disputes was quite proper. The taxpayer was not entitled to have these remittances treated as a satisfaction of its tax liabilities in whole or in part, and at the same time continue to contest such liabilities, or at best leave the Collector with an ambiguous situation on his hands.

Rosenman v. *United States*, 323 U. S. 658 (1945), while not reaching the precise point we have here, does support our view of the matter. In that case the Supreme Court held that the period of limitation on refund claims provided in §910, I. R. C., requiring such claims to be presented within three years "after the payment of such tax," commenced to run from the time the Commissioner assessed the tax rather than from an earlier time when the taxpayer had made a general payment on account of estimated estate taxes. Stating that "payment" of a tax as contemplated by

§910, I. R. C., "plainly presupposes challenged action by [fol. 252] the taxing officials" in response to which a remittance is made, the Court under the facts of that case held that no "tax payment" occurred until there had been an assessment followed by its satisfaction in part out of moneys already deposited with the Collector and in part by additional amounts paid by the taxpayer in response to such assessment, since it was only at that point that interest began to run against the Government on any amount in excess of that ultimately found due as the tax. While we do not read *Rosenman* to foreclose treating as a tax payment any remittance made prior to assessment, we do think that it supports the view that a remittance which does not *satisfy* an asserted tax liability should not be treated as the "payment" of a tax. Satisfaction may, as in *Rosenman*, follow from payment of a tax assessed, for such a payment extinguishes the asserted liability, even though the taxpayer is left with an independent claim for refund which survives the discharge of the assessment. Or it may follow from the payment of an asserted liability in advance of assessment, as appears to be contemplated by §56(d), I. R. C., and 26 C. F. R. 601.13(b)(2),[2] *if*, as is expressly provided in the latter and by necessary implication in the former, the payment is accompanied by the taxpayer's acquiescence in the proposed deficiency. The same holds true as to §271(a)(1)(B), requiring that amounts "collected without assessment" be excluded from the computation of a deficiency, for here again acquiescence by the taxpayer in such collections as constituting satisfaction of part of his tax liability is a condition necessarily to be implied. In short, there can be no payment without satisfaction whether pursuant to or apart from an assessment. Here the taxpayer was tendering its check with one hand, and [fol. 253] contesting its liability to pay with the other. Its Tax Court proceedings as to the 1943 deficiency still stood, and that avenue was still open to it as to 1944 and 1945 taxes.

The taxpayer is quite mistaken, we believe, in reading *Rosenman* as standing for the proposition that the 1947

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[2] See also informal ruling of Internal Revenue Bureau contained in Prentice-Hall Federal Tax Service, 1950, par. 76,331.

remittances should be treated as tax payments *ab initio* to the extent of the taxes ultimately found owing because they were effective to stop the running of interest against the taxpayer. The initial *Rosenman* payment was found not to be a tax payment despite the fact that the Court recognized that it stopped penalties and, as the Government conceded, interest *against the taxpayer*. It was found not to be a tax payment because it gave rise to no interest claim *against the Government*. The situation here is no different. Nor do we find such decisions as *Hanley* v. *United States*, 63 F. Supp. 73 (Ct. Cls. 1945), inconsistent with our conclusion, for there the taxpayer did not negative "payment" by simultaneous contest. Cf. *Murphy* v. *United States*, 78 F. Supp. 236 (S. D. Calif. 1948).

We hold that the 1947 remittances did not constitute "payment" of the taxpayer's 1943, 1944 and 1945 tax liabilities. They were no more than deposits "made in the nature of a cash bond for the payment of taxes thereafter found to be due." *Rosenman*, at p. 662.

The taxpayer also argues that the Tax Court's order entered on the 1948 stipulation settling the 1943 excess profits tax liability binds the Government by way of collateral estoppel from now asserting that the 1947 remittance in respect of the 1943 tax was not a payment of the tax. We need not dwell on this contention. It seems clear (although the pleadings are not before us) that the settlement was concerned only with the *fact* of payment and not with its *date*. The item in the stipulation "Tax paid: September 29, 1947 (3rd NY)" does not persuade us that the [fol. 254] question we now have before us was really at issue in the Tax Court.

2. *1947 Interest Payments*

For the same reasons the taxpayer's contention as to the deductibility of the 1947 interest payments in respect of 1943, 1944 and 1945 taxes must also fail.

3. *1946 Net Operating Loss*

The taxpayer challenges the determination of the Commissioner and the Tax Court as to the amount of the 1946 net operating loss.

As determined below, the net operating loss for 1946 was $164,326.38. The taxpayer argues that it should have been increased by $861,118.04, being the amount of the excess profits taxes which it paid in that year in respect of 1945.

This requires us to interpret the phrase "paid or accrued" in §122(d)(6) permitting the deduction of excess profits taxes "paid or accrued within the taxable year" in the computation of the net operating loss under §122(a). As already noted, it was unnecessary to reach this problem with respect to the 1947 net operating loss. The Tax Court held that "paid or accrued" meant that a *cash* taxpayer was entitled to deduct only excess profits taxes "paid," and an *accrual* taxpayer only those "accrued," within the taxable year, and that since Lewyt was an accrual taxpayer this sum of $861,118.04 could only be reckoned in Lewyt's tax computations for 1945. We think the Tax Court was right.

We start with the statute itself. Section 48(c), I. R. C., 26 U. S. C. A. §48, provides that "when used in this chapter" (that is Chapter 1 entitled "Income Tax") "the terms * * * 'paid or accrued' shall be construed *according to the method of accounting upon the basis of which the net in-*[fol. 255] *come is computed under this Part* [IV "Accounting Periods and Methods of Accounting"].[3] See also T. R. 29.43-1. Section 43, I. R. C., 26 U. S. C. A. §43, captioned "Period for which deductions and credits taken" states: "The deductions and credits * * * provided for in this chapter [1] shall be taken for the taxable year in which 'paid or accrued' * * * dependent upon the method of accounting upon the basis of which net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period."

The taxpayer makes a number of arguments to avoid what we think to be the plain effect of these provisions. We consider first its argument based on legislative history. Section 202(a) of the Revenue Act of 1941 amended §23(c) of the Internal Revenue Code to permit deduction of Chapter 2E excess profits taxes "paid or accrued within the taxable year" in computing net income, subject to certain

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[3] All italics in this opinion have been supplied.

rules provided in §23(c)(2), one of which, "A," stated: "The deduction shall be limited to the tax *imposed* for the taxable year, but any portion of such tax paid *after* the taxable year shall be considered as having been paid *within* the taxable year * * *" The taxpayer here points out, and we think correctly, that this last quoted provision in effect placed cash and accrual taxpayers substantially on an *accrual* basis so far as the excess profits tax deduction was concerned. Then came the Revenue Act of 1942 which by §105(c) eliminated Chapter 2E excess profits taxes as a deduction in computing net income, but added, by §105(c)(3)(C), a new Section, §122(d)(6), permitting the deduction of such excess profits taxes from gross income in computing the net operating loss, and net operating loss "carry-backs" and "carry-overs," subject to rules which were the same as those presently contained in §122(d)(6).

[fol. 256] Pointing out that these rules are substantially the same as those formerly contained in §23(c)(2) as amended by the Revenue Act of 1941, except that rule "A" of that section, quoted above, was omitted, the taxpayer argues that one of two inferences should be drawn—either that the Congressional intent was that the basis of deductibility of excess profits taxes should follow the taxpayer's method of accounting, *i.e.*, cash or accrual, or that in this respect the Act gave a taxpayer, whether cash or accrual, an election to deduct such taxes if either paid or accrued. It is urged that the latter inference is the more compelling, it being argued, as we shall see in a moment, that to draw the first inference would attribute to Congress an intention to "discriminate" between cash and accrual taxpayers, in that an accrual taxpayer, absent such an election, would rarely be able to take an excess profits deduction in a "loss" year.

We think that without more — the arguments for and against these opposing inferences would at best present a stand-off. But we need not pause to examine them further, for here we have the explicit direction of §43 that this deduction "shall be taken for the taxable year in which 'paid or accrued' * * * *dependent upon the method of accounting upon the basis of which net income is computed*, unless in order to reflect the income the deductions * * * should be taken as of a different period." Certainly the

exception would have no application in this instance, and it appears not to be contended to the contrary.

Next, we are referred to *Commissioner* v. *Clarion Oil Co.*, 148 F. 2d 671 (D. C. Cir.), *cert. denied* 325 U. S. 881 (1945), and a line of cases following it, *Birmingham* v. *Loetscher Co.*, 188 F. 2d 78 (8th Cir. 1951); *Aramo-Stiftung* v. *Comm'r*, 172 F. 2d 896 (2d Cir. 1949); and *Wm. J. Lemp Brewing Co.* v. *Comm'r*, 18 T. C. 586 (1952), holding that the provisions of former §356, I. R. C., now §505(a)(1), [fol. 257] I. R. C., 26 U. S. C. A. §505, permitting the deduction of excess profits taxes "paid or accrued during the taxable year" in computing the surtax upon the undistributed net income of personal holding companies under §500, I. R. C., 26 U. S. C. A. §500, gives a taxpayer, whether cash or accrual, the option of taking this deduction on either basis. The ground of these decisions, as exemplified by *Clarion*, is that the provisions of §48(c) in Chapter 1 of the Internal Revenue Code defining "paid or accrued" in terms of a taxpayer's method of reporting for the purpose of computing *net income* under that Chapter, have no application to the meaning of §505(a)(1) permitting deduction of excess profits taxes for the purpose of computing the *undistributed income* tax on personal holding companies under Chapter 2. "But, obviously, this definition [48(c)] was intended to apply to the method of computing *net income*, and has no reference or relevancy to the subject matter of what, for the purposes of the newly added provision in relation to personal holding companies is taxable as *undistributed* income." *Clarion*, at p. 675. Stated otherwise, Chapter 2 contains no provisions comparable to §48(c) and §43 of Chapter 1 defining the phrase "paid or accrued."

The *Clarion* and the other cases cited are inapplicable to the one before us. Here the meaning of "paid or accrued" in §122(d)(6) is directly involved in the computation of *net income*, for §23(s) allows as a deduction in "computing net income" under §23 "the net operating loss deduction computed under Section 122." In addition, to the extent that the meaning of "paid or accrued" is involved in the computation of the net operating loss itself by application of the §122(d)(6) deduction, §43 specifically gives

it the same meaning as §48(c) requires in connection with the computation of net income.

[fol. 258] The third contention which the taxpayer presses upon us is that to construe §122(d)(6) as we do discriminates against the accrual taxpayer. The argument is that in the nature of things it is usually impossible for a taxpayer to incur in the same year both an excess profits tax liability and a net operating loss. Therefore, it is said, an *accrual* taxpayer in most cases will be unable to get the benefit of the §122(d)(6) adjustment in calculating his net income, while a *cash* taxpayer normally will. Take this hypothetical situation as illustrative of the taxpayer's point. A corporation had high profit years in 1942 and 1943 and incurred a $1,000,000 excess profits tax liability in the latter year, which it paid in 1944. In 1944 it had a net operating loss of $500,000, without regard to any §122(d)(6) adjustment. If an *accrual* taxpayer, the corporation would not be able to add its excess profits taxes for 1943 to its net operating loss for 1944; if a *cash* taxpayer, it would; and this in turn would mean that the cash taxpayer's net operating loss "carry-back" to 1942 and 1943 under §122(b)(1) would be increased by $1,000,000, whereas the accrual taxpayer's "carry-back" would remain at $500,000.

We may conceive of situations where the accrual taxpayer is not put at this disadvantage with the cash taxpayer. One such is a situation where, as in the case of this taxpayer's 1943 excess profits taxes, accrual of the excess profits tax liability has been postponed because of a dispute concerning it, and the time of payment and accrual therefore coincide. See *Robert Reis & Co.* v. *Comm'r*, 20 T. C. 294 (1953). Nevertheless, we would not be candid if we failed to recognize the force of what the taxpayer argues here. But however sympathetic one may be to this predicament of an accrual taxpayer—a phenomenon by no means unique under the tax laws—we would not be justified in ignoring the plain mandate of the statute.

[fol. 259] Finally, on this point the taxpayer gives us the decision of the Court of Claims in *Olympic Radio and Television, Inc.* v. *United States*, 108 F. Supp. 109 (1952), *rehearing denied* 110 F. Supp. 600 (1953), which squarely upholds the position of the taxpayer as to the meaning of "paid or accrued" in §122(d)(6). We have given careful

and respectful consideration to the two opinions of the majority in that case, which were based largely on the same considerations urged upon us by the taxpayer here, and find ourselves unable to agree with the Court of Claims.

4. *1946 Net Operating Loss "Carry-Back"*

Now we came to the issue involving the "carry-back" of the 1946 net operating loss to 1944 and 1945. As previously noted, §122(b)(1) requires that such loss be applied first to the year 1944 and the excess, if any, to 1945. That excess is the amount by which the 1946 operating loss exceeds the income for 1944 "computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6) [of §122] *and* (B) by determining the net operating loss *deduction* for such second preceding taxable year [1944] without regard to such [1946] net operating loss." §122(b)(1) and §122(c).

In terms of the present case, the situation in this: The taxpayer's 1944 income, as to which there is no dispute, was $584,866.81, *without regard* to any §122(d)(6) adjustment or the 1946 net operating loss deduction under §23(s). There was no net operating loss for 1944. The net operating loss for 1946, as determined by the Commissioner, was $164,326.38, and we have already disposed of the contention that it should have been increased by $861,118.04, the amount of the excess profits taxes paid by the taxpayer in 1946 in respect of 1945.

The taxpayer contends that in computing the amount of the 1946 net operating loss ($164,326.38) which is to be [fol. 260] carried back to 1945, there should first be offset against 1944 net income ($584,866.81) either (a) the sum of $759,916.50, being the amount of the 1943 excess profits taxes reflected in the taxpayer's return for that year and *paid* by it in 1944, or (b) the sum of $625,561.59, being the amount of the 1944 excess profits taxes as reflected in the taxpayer's return for 1944, and which it claims *accrued* in 1944. Since under (a) the 1943 excess profits taxes *paid* in 1944 ($759,916.50) exceeded by $175,049.69 the unadjusted net income for 1944 ($584,866.81) and under (b) the 1944 excess profits taxes *accrued* for that year ($625,561.59) exceeded by $40,694.78 such net income for 1944 ($584,866.81), the taxpayer claims that the entire 1946 net

operating loss ($164,326.38) constitutes a "carry-back" to 1945. We cannot agree.

What we have already held as to the meaning of "paid or accrued" in §122(d)(6) in connection with the computation of the 1946 net operating loss equally applies to the §122(d)(6) adjustment to 1944 net income, and disposes of the contention that for this purpose the taxpayer was entitled to deduct from such income the 1943 excess profits taxes *paid* in 1944.

The other contention must also fail. The excess profits taxes ultimately found by the Commissioner to be due in respect of the year 1944 were $280,540.33, and not $625,561.59, as originally reported in the taxpayer's 1944 return, and we think it was this figure rather than the uncorrected figure which represented the measure of the §122(d)(6) adjustment to 1944 net income. Section 122(d)(6) allows the deduction of "the amount" of excess profits taxes "imposed" and (in the case of an accrual taxpayer) "accrued within the taxable year." The tax which was "imposed" for 1944 was $280,540.33, and that in our opinion was "the amount" of the tax which "accrued" in 1944 for purposes [fol. 261] of this adjustment. True, it has been held that when all the events necessary to determine the amount of a tax have occurred within a taxable year, the tax as reported in that year constitutes the tax "accrued" despite the occurrence of later events which change the amount of the tax ultimately found due. See *United States* v. *Detroit-Moulding Corp.*, 56 F. Supp. 754 (E. D. Mich. 1944). But if we are to follow this view we should also take the *income* as originally reported in the 1944 return, *viz.*, $827,852.99 instead of $584,866.81 as finally determined by the Commissioner. What the taxpayer is seeking to do is to have the benefit of both the *smaller* 1944 income as finally determined ($584,866.81) and the *larger* excess profits tax ($625,561.59), based upon the income as originally reported. The taxpayer must match either the *returned* income ($827,852.99) against the *returned* excess profits tax based thereon ($625,561.59), or the *determined* income ($584,866.81) against the *determined* excess profits tax ($280,540.33). It cannot have it both ways at the same time by matching *determined* income against *returned* excess profits taxes.

And we think it is *determined* income and excess profits taxes that represent the proper §122(d)(6) adjustment, since the manifest purpose of the "carry-back" and "carry-over" provisions of the statute, §122(b)(1), (2) is that the incidence of this kind of taxation upon a business enterprise shall in effect be looked at from the vantage point of a five year period, that is the current taxable year plus two "carry-back" and two "carry-over" taxable years.

In light of this wearisome discussion, we think that the correct situation as to the 1946 "carry-back" was this: The taxpayer's 1944 net income, before the §122(d)(6) and §23(s) adjustments, was $584,866.81. The excess profits taxes which accrued for 1944 were $280,540.33. After the [fol. 262] §122(d)(6) adjustment ($584,866.81 *minus* $280,-540.33), the balance of 1944 income was $304,326.48. Since this was greater than the net operating loss for 1946 ($164,-326.38), this resulted, as the Commissioner and Tax Court determined, in there being nothing left from the 1946 net operating loss to "carry back" to 1945. It likewise resulted in there being taxable income for 1944.

5. Computation of 1945 Excess Profits Tax Deficiency

In computing the excess profits tax deficiency for 1945, the Commissioner apparently gave no credit for the $108,-437.36 remitted by the taxpayer on September 29, 1947. The taxpayer asserts this was an amount "collected without assessment" which under §271(a)(1)(B) the Commissioner was required to take into account in computing the 1945 deficiency. See *McConkey* v. *Comm'r*, 199 F. 2d 892 (4th Cir. 1952), *cert. denied* 345 U. S. 924 (1953); *Bendheim* v. *Comm'r*, 2d Cir., decided June 9, 1954.

For the reasons already discussed, we think that this would be so only if the remittance were made under circumstances which would constitute it a satisfaction of a tax liability in whole or in part. In the *McConkey* and *Bendheim* cases, *supra*, the taxpayers made remittances similar to that now under consideration. Each of those remittances was deposited in the Collector's "Suspense Account" and stood, under the authority of the *Rosenman* case, as "a cash bond for the payment of taxes thereafter found to be due," or, in effect, as a continuing offer by the

taxpayer to the Collector that he apply the amount to the discharge of a tax liability in whole or in part. And in each of those cases the Collector, after these deposits with their implicit offers had been made, stated a proposed deficiency not in excess of the deposit, thereby indicating unequivocally an acceptance of the taxpayer's offer. Accordingly, the amounts became "collected without assess-[fol. 263] ment" within the meaning of §271(a)(1)(B), and the taxpayer's sole remedy remaining was an independent suit for refund.

Here, however, the Collector did not accept, explicitly or implicitly, the taxpayer's remittance as a discharge of its tax liability, in whole or in part, nor could he be forced to do so while that liability was still in dispute. Indeed, no deficiency had yet been proposed in 1947. But in 1948 the Revenue Agent proposed a deficiency in excess of the taxpayer's remittance, as to which the Commissioner issued his deficiency notice on February 16, 1950, and which the taxpayer was free to, and did, contest; and certainly the Commissioner for his part was not required to circumscribe his position in the ensuing litigation in the Tax Court by making application of such remittance to the asserted tax liability. In other words, until the Commissioner, with unequivocal authority of the taxpayer, applied or was required to apply the $108,437.36 remittance as a satisfaction, in whole or in part, of the asserted tax liability, this remittance did not constitute an amount "collected without assessment" within the meaning of §271, but continued as no more than a deposit voluntarily made by the taxpayer.

Affirmed.

[fols. 264-285] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Hon. Charles E. Clark, Hon. Carroll C. Hincks, Hon. John M. Harlan, Circuit Judges.

LEWYT CORP., (Now known as Lewyt Manufacturing Corporation), Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

JUDGMENT—July 14, 1954

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

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[fol. 286] [Endorsed:] United States Court of Appeals, Second Circuit. Filed August 24, 1954. A. Daniel Fusaro, Clerk.

[fols. 287-288] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Hon. Charles E. Clark, Hon. Carroll C. Hincks, Hon. John M. Harlan, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—August 24, 1954

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) A. Daniel Fusaro, Clerk.

[fol. 289] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 290] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 417

LEWYT CORPORATION (now known as Lewyt Manufacturing Corporation), Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

ORDER ALLOWING CERTIORARI—Filed December 6, 1945

The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to questions 1 and 2 presented by the application for the writ which read as follows:

"1. Whether, in the case of a taxpayer on the accrual basis, excess profits taxes paid within a taxable year constitute excess profits taxes 'paid or accrued within the taxable year' under § 122 (d) (6), 122(a) and § 122 (b) (1)

of the Internal Revenue Code of 1939 ('the Code') dealing with the computation of the net operating loss deduction.

2. Whether under § 122 (d) (6) and § 122 (b) (1) of the Code the 'tax imposed by Subchapter E of Chapter 2' [the excess profits tax] 'accrued within the taxable year' is the excess profits tax computed on the basis of the facts existing at the end of such taxable year or whether it is the excess profits tax ultimately determined to be due after application of a carry-back arising in a later year and after giving effect to other circumstances arising in later years."

The case is transferred to the summary calendar and assigned for argument immediately following No. 10.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.